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# Draft Convention on Assignment of Receivables in International Trade

## Compilation of comments by Governments and international organizations

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# I. Introduction

1. At its thirty-third session in 2000, the Commission adopted articles 1 through 17 of the draft Convention on Assignment in International Trade and referred articles 18 through 44 of the draft Convention, as well as the Annex to the draft Convention, to the Working Group.[1] At that session, the Commission requested the Secretariat to distribute for comments the draft Convention after the completion of the work of the Working Group.[2] The Working Group met in Vienna from 11 to 22 December 2000 and adopted articles 18 to 47 of the draft Convention and the annex.[3]

2. By note verbale of 7 February 2001, the Secretary-General forwarded to States and international organizations that are invited to attend the meetings of the Commission and its working groups as observers the consolidated text of the draft Convention which appears in an annex to report of the last session of the Working Group, and requested them to submit their comments on the draft Convention. This note reproduces the first comments received by the Secretariat. Further comments will be issued as addenda to this note and in the order they are received.

# II. Compilation of comments

## A. States

### 1. Czech Republic

**[Original: English]**

**General comments**

We refer to our previous comments published in A/CN.9/472. Czech Republic is still in the position that our national law differs in some basic aspects from the draft Convention. Owing to the fact that international agreements must be in conformity with national legislation, if we were to adopt the draft Convention, it would be necessary for us to change our Civil or Commercial Code.

The main divergences relate to articles 11 and 12 of the draft Convention. Under Czech law, it is not possible to assign a receivable contrary to an anti-assignment agreement between the assignor and the debtor. In addition, we are concerned about articles 15 and 17, because under Czech law, the assignor is obliged to notify the debtor without undue delay. Another concern relates to article 21. Under our national law any waiver of future defences and rights of set-off is prohibited.

**Specific comments**

**Article 4:** We are in favour of excluding in paragraph 1 transfers of negotiable instruments made by book entry in a depository's accounts without delivery or endorsement, as well as of transfers

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[1] Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 A/55/17, paras. 186-188.

[2] Ibid., para. 191.

[3] The report of the Working Group is in document A/CN.9/486.

made by mere delivery without a necessary endorsement. As to paragraph 4, we prefer its retention so that States would have the right to exclude by declaration further types of assignment.

**Article 17:** We think that article 17 is sufficient and does not need to be revised to address consumer protection issues.

**New provision on form in chapter V:** We are not against a new private international law provision on form in chapter V. We propose that the form of assignment should be governed by the law of the State where the contract of assignment has been concluded.

**Article 20:** We support the proposal to include in article 20 wording along the lines of article 30 in order to ensure that the rule in article 30 would not be subject to an opt-out by States.

**Article 38:** We consider that the current wording is sufficient to resolve potential conflicts of the draft Convention with other international agreements.

**Article 44:** For the sake of consistency with other provisions of the draft Convention that provide for reservations, we prefer "reservations" to "declarations".

**Procedure for the final adoption of the draft Convention:** We prefer that the draft Convention be submitted to the General Assembly for final adoption.

**Conclusions:** In conclusion, we have to state that, due to the above-mentioned divergences between our national law and the draft Convention, at this stage, the Czech Republic will not be able to adopt the Convention, since we would have to change our Civil or Commercial Code. However, an important modification of our Constitution is currently being discussed. This modification would change the dualistic system of relation between national and international law and would result in international agreements prevailing over national legislation. In view of this development and of our interest in facilitating international receivables financing practices, such as factoring and forfaiting, in our country, we consider that we will have the opportunity to adopt the Convention in the near future.

## 2. Peru

**[Original: Spanish]**

**General comments**

We note that the draft is a considerable improvement over the one we received and commented on last year.

**Specific comments**

**Article 4:** We agree that the assignment of receivables through the endorsement of a negotiable instrument (i.e. a bill of exchange, promissory note or cheque) should be excluded, since the act of assignment is legally distinct from the act of endorsement and has different consequences. Receivables capable of being assigned can be readily distinguished from receivables contained in negotiable instruments, since the latter are transferred by endorsement or by other means distinct from assignment.

Accordingly, transfers of negotiable instruments should be excluded, whether made by delivery and endorsement or my mere delivery (even in cases where endorsement may be necessary). We would think that transfers of dematerialized instruments transferred electronically by means of a book entry would not need to be excluded. However, we could accept their

exclusion if consensus is formed in the Commission in favour of an exclusion.

With regard to paragraph 4, we believe that States should be allowed to exclude by declaration further types of assignment.

**Article 11, paragraph 3 (a):** We believe that the reference to goods should be retained.

**Article 17:** We agree with the current formulation of article 17. It does not need to be revised to address consumer-protection issues.

**Article 20:** In our opinion, it is unnecessary to include in article 20 a provision similar to the one in article 30. Article 30 is sufficient.

**Article 24, para. 1 (b) and (c):** We believe that paragraphs (b) and (c) of article 24 should be retained. We have no way of determining whether or not they are consistent with the work of the Hague Conference on Private International Law.

**New provision on form in chapter V:** In our opinion, it is not necessary to include in chapter V a new private international law provision on form. Generally applicable private international law rules are sufficient to address the matter. Under Peruvian law, for example, form is subject to either the law of the place where the legal act or transaction is concluded or the documents are executed, or to the law governing the legal relationship arising from the legal act or transaction.

**Article 38:** We agree with the Working Group's comments contained in paragraph 105 of document A/CN.9/486.

**Article 44:** We agree with the provision in article 44 providing that no reservations are permitted except those expressly authorized. This rule gives consistency and coherence to the draft Convention.

**Annex:** The rules contained in articles 6 to 9 of the Annex appear to be adequate.

**Procedure for the final adoption of the draft Convention:** For practical reasons, we would think that the draft Convention should be referred to the General Assembly for final adoption.

## 3. United States of America

**[Original: English]**

**General comments**

The United States looks forward to completing work on the draft Convention on Assignment of Receivables in International Trade at the upcoming Commission session. Completion of this work and prompt adoption by States of the text, together with appropriate consideration of optional priority rules in the Annex, will make modern commercial financing more readily available in greater amounts and at more affordable rates in all regions and levels of development.

**Specific comments**

**I. Articles bracketed by the Commission in June 2000 (articles 1-17)**

**Article 1, para. 4:** We concur with the decision of the Working Group to remove the brackets from paragraph 4 (A/CN.9/486, para. 75).

**Article 4, para. 4:** We believe that this paragraph should be retained with the addition of

language indicating when an assignor or debtor must be located in a Contracting State (see, for example, art. 3). The paragraph provides the necessary flexibility to exclude future financing practices for which the Convention's rules may be inappropriate. To the extent that the Commission is able to identify existing practices that should be excluded, the Commission should expressly exclude those practices by reference in the appropriate preceding paragraphs of article 4. Failure to do so will encourage groups that engage in these practices to oppose adoption of the Convention.

**Articles 11, para. 3 (a), and 12, para. 4 (a):** We think that the word "goods" in these subparagraphs should be retained with the brackets removed. It is unnecessary to substitute a broader term that would cover both tangible and intangible property because the subparagraphs immediately following the cited subparagraphs refer to the types of intangible property important in financing practice.

**II. Articles not yet considered by the Commission (articles 18-47, Annex)**

**Articles 24 and 5 (g):** After consultations, we reluctantly conclude that there will be insufficient time at the upcoming Commission session to resolve the complex issues raised by subparagraphs (b) and (c) of paragraph 1. We therefore think that these bracketed subparagraphs should not be retained.

Article 24 addresses the 'priority' of competing rights in a receivable; article 5(g) defines 'priority.' We think that article 24 would be clarified and simplified if the definition of 'priority' were redrafted to clarify what issues are to be resolved when determining whether a person has a right in a receivable superior to the right of another claimant. These issues include whether the right is a property right, whether it is security for indebtedness or other obligations, and whether the right is prior to the right of another claimant. If the definition of 'priority' is amended in this way, paragraph 2 of article 24 would no longer be necessary. With these thoughts in mind, the Commission might consider the following language in substitution of the definition now found in article 5 (g):

> "(g) "Priority" means the right of a person in preference to a competing claimant or other person. The term includes the determination of whether the right is a personal or property right and whether the right arises from an assignment as security for indebtedness or other obligations."

**Article 26, para. 2:** We believe that in the context of article 26 the reference to "competing claimant" is too broad. An assignee claiming the proceeds as proceeds of the assigned receivable should not necessarily have priority over an assignee that claims the proceeds as original collateral, a purchaser for value of the proceeds, or a person with a right of set-off against the proceeds. Whether the assignee has priority over these competitors should be left to other law. With these thoughts in mind, the Commission might consider the following language for a new paragraph 3:

> "Nothing in paragraph 2 affects the priority as against the assignee, under law outside this Convention, of a right, not derived from the receivable, of (i) a person holding a consensual security right in the proceeds, (ii) a consensual transferee of the proceeds for value, or (iii) a person holding a right of setoff against the proceeds."

The Convention should also clarify whether exclusions under article 4 of types of assignment or of categories of receivables are exclusions for all purposes, including priority in proceeds under article 26, or only for some purposes.

**Article 26, para. 2 (b):** In practice it is more and more difficult to distinguish between bank accounts and security accounts. We suggest, therefore, that the words 'or securities account' be added after the words 'deposit account' and that the following clause: 'or investment securities purchased with such cash receipts' be added at the end of paragraph 2 (b).

**Article 37:** To ensure appropriate application of the Convention in some States we believe that this article must be retained with the brackets removed. The present text of the article will need to be modified so that a State comprised of two or more territorial units may apply its own choice-of-law rules to the extent that they operate only among the territorial units within that State. If the article is so modified, the definition of 'law' in article 5 (i) should note that it is subject to article 37.

**Article 38:** The Commission will need to consider adding a paragraph to address the special concerns of the aircraft and the air transport industries for which the Convention's rules may not be consistent with existing financing practices of these industries.

**Article 41**: We think that this article should be retained and the brackets removed. The paragraph provides the necessary flexibility to exclude future financing practices for which the Convention's rules are inappropriate.

**Article 42:** We believe that a State should be authorized to modify or add to any of the model substantive provisions set out in Sections I, III and IV in order to adapt their provisions to its national law or to financial practices. A paragraph should be added to article 42 to permit a State making a declaration under that article to indicate in its declaration any modifications or additions to Sections I, III or IV it wishes to make.

**III. Other issues**

**Article 4, para. 1 (b):** The underlying policy of this subparagraph would be better expressed if the subparagraph stated that nothing in the Convention affected rights to the negotiable instruments or the rights and obligations of parties arising under applicable laws governing negotiable instruments. If the present exclusion is retained, it should be made clear that negotiable instruments may nevertheless be proceeds covered by the Convention.

In any event, the Commission should clarify what instruments fall within "negotiable instruments." We think that the term should be restricted to those instruments that have traditionally been subject to special legislation such as the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes: bills of exchange (drafts), promissory notes and checks.

**Article 4, para. 2:** It should be made clear that although this paragraph excludes bank accounts and securities accounts these accounts may be proceeds covered by the Convention. We urge the Commission to exclude foreign exchange transactions not otherwise excluded by the netting or other agreed exclusions. The Convention's rules are not necessary for that market and may disrupt existing practices.

**Article 4, para. 2 (f):** The exclusion in subparagraph (f) of paragraph 2 may not fully capture the policy decision taken to exclude dealings with financial assets, including negotiable instruments (however defined), held in an indirect holding system. Thus, this subparagraph might state expressly that any financial asset credited to a securities account should be treated the same way as an investment security credited to that account.

**Article 5, subpara. (g):** We recommend that the definition of subparagraph (g) of article 5 be redrafted to clarify what issues are to be resolved when determining whether a person has a superior right in a receivable to another claimant. Proposed language is set out in connection with the earlier comment on article 24.

**Article 9, para. 4:** We think that the policy embodied in this paragraph applies equally to questions of form covered by article 8. The paragraph should be amended to state this explicitly.

**Article 10:** The Commission should reexamine whether this article remains necessary.

# B. International organizations

## 1. European Bank for Reconstruction and Development

[Original: English]

### General comments

The EBRD welcomes the recent developments on the draft Convention and hopes that consensus on the draft will be found at the thirty-fourth session of the Commission this summer. The importance of assignment of receivables for countries of Central and Eastern Europe and the Commonwealth of Independent States where the Bank operates cannot be overestimated. Foreign investors in particular need urgently greater certainty as to the rules applicable in this matter.

As a general background comment, we would like to note that the EBRD can only comment on the difficulties it foresees for some of the States that may want to sign and ratify the Convention. In our experience of legal reform in the region, there is a large gap between the and practice existing in this region and what is viewed as appropriate in countries with developed economies. By imposing rules or concept that are too alien, one runs the risk of a complete rejection of the reform by a country. This does not mean that progress is impossible. Beyond a bare set of principles around which there must be a consensus (such as the EBRD Core Principles of Secured Transactions), there must be room for compromise and for finding solutions more adapted to what a country can or wants to absorb, or finds appropriate at a given time.

Below are listed a number of comments on some of the draft Convention's articles. We understand that comments were sought only for the sections that were not adopted at the last session and on which the Working Group has been working in preparation to the next session. However, we feel that our comments may have wider impact than the actual article to which they actually refer.

### Specific comments

**Article 2:** We are concerned that the article rejects the conceptual distinction between the transfer of receivable and the creation of rights in receivables as security for another obligation. To our knowledge, such conceptual distinction is made in most if not all of our countries of operations, with separate regimes applying to one and the other. It would be very difficult to harmonise the Convention with the existing system, especially as the Convention would apply only to international receivables or international assignments. We have also conceptual reservations on treating equally assignments by way of sale and assignment by way of security. As part of the EBRD Model Law and the subsequent assessment we made based on its principles (see www.ebrd.com/english/st.htm), we make very clear that a charge over movable assets (including tangible ones) is conceptually different from a fiduciary transfer of property or indeed a transfer of property with a retention of title clause. In this respect, we differ from the approach adopted under the US Uniform Commercial Code, Article 9. There is evidence that countries of the region have felt more comfortable with keeping the two types of assignments separated.

**Article 9, para. 4:** The principle expressed in this paragraph is clear but it is unclear how that would work in practice, since the assignment should not only not be ineffective but should be effective *and* enforceable. For example, if a local law does not recognize as valid an assignment of receivables by way of security unless the receivable is clearly identified in the security agreement, and this law becomes applicable, the assignment of generally described receivables will presumably still be valid under the Convention. But we are not sure what would be the priority of the right of an assignee with respect to the right of a secured creditor who was given in security the enterprise, including book orders, and may wish to enforce its security over the enterprise. Presumably, no rule would be available since under local law, the assignment would simply be invalid.

**Article 11:** It is felt that overriding contractual obligations on subsequent assignments between the parties is not satisfactory, especially when the prohibition was known by the subsequent assignee. Naturally, registration of the assignment would permit to solve the problem of notice and of knowledge on the part of third parties (see comments below).

**Article 15:** In view of the fact that one of the objectives of the Convention is to remove the formalities usually associated with the notification to the debtor, it would be preferable to be more specific as to the way notification is to be given to the debtor, especially "by all means", or simply in written form. In fact, at the age of electronic communication, it would certainly make sense to explore the ways such notification could be given safely as well as quickly and simply, at a low cost.

**Article 20, para. 2:** The remark made above applies to the rule contained in article 20, paragraph 2. In effect, as the right of set-off between the assignee's right and the debtor's rights against the assignor depends on the precise time where notification of the assignment is received, it is imperative that clear rules on the proof of the date are spelled out in the Convention. Otherwise, the risk would be that the local law applicable would not provide any satisfactory rule on this essential point.

**Article 41:** The article is very complex, perhaps unduly, and this is unfortunate as it can create uncertainties.

**Annex:** In general, we welcome these provisions as they give the message we are trying to convey to the countries of the region EBRD is responsible for, namely that extensive registration can simplify complex rules and provide certainty and simplicity for the priorities rules.

**Article 4, para. 1 of the Annex:** We feel it is important to have at the time of registration evidence of both parties' consent to the assignment, either by their signature, or by other means. It would avoid the risk of fraud.

**Article 5 of the Annex:** We do not find the period of five years necessary for the registry to operate properly and we would leave this aspect to the local regulations on registration.

## 2. European Central Bank

**[Original: English]**

**General comments**

The Legal Services of the European Central Bank (ECB) follow this initiative of the Commission closely and with great interest. In particular, we are hopeful that the provisions of the draft Convention will promote an effective and sound regulation of the assignment of receivables.

We have reviewed the report and the provisions of the draft Convention, as elaborated by the Working Group. We have noted in particular the exclusion from the scope of application of the draft Convention of assignments of receivables arising from financial contracts. Financial contracts are generally subject to master agreements governed by the laws of a particular jurisdiction. An assignment of receivables arising from such contracts may interfere with, *inter alia*, the calculations and the pricing made by credit institutions. We, therefore express our appreciation for this exclusion as a result of which the central banking community will not be affected by the provisions of the draft Convention.

**Specific comments**

**Articles 24 and 26:** In our view, some guidance may be needed concerning the relation between the draft Convention and the provisions of the proposal by the Hague Conference on Private International Law for a convention concerning the law applicable to dispositions of securities held through one or more intermediaries. This would seem particularly relevant to articles 24 to 26 of the draft Convention. It may, therefore, be advisable to consider and clarify the relation between the two documents.

Furthermore, the conflict-of-laws provision of article 24, paragraph (1) (b) (ii), should promote the approach that interests over securities are governed by the law of the location of the securities account of the relevant intermediary (PRIMA). The exact wording of this principle, however, may require further consideration and should take into account work, which is carried out in this respect in relation to the proposal of the Hague Conference and to the proposed directive of the Commission of the European Union on the use of collateral. In the end, this provision of the draft Convention should be fully consistent with, and in no case contradict, the text that will emerge from the Hague Conference.

Our understanding of article 24, paragraph 1 (c), leads us to the conclusion that this provision seems to go beyond the scope of the draft Convention. Article 24, paragraph 1 (b), appropriately addresses the characteristics and priority of the right of an assignee vis-à-vis a competing claimant. However, the existence and characteristics of the rights of a competing claimant may well be subject to a law other than the law of the assignor's location. This result would be normal and would not negatively affect the certainty provided for by the draft Convention.

## 3. Factors Chain International

**[Original: English]**

**General comments**

The purpose of Factors Chain International (FCI) with about one hundred and fifty members in fifty-one countries is to facilitate the provision of finance and services by its members for the movement of goods and services across international borders. It is therefore of particular interest to FCI that the finalised version of the convention should achieve its objects of encouraging the availability of credit and its provision at reasonable cost for international commerce and trade.

In order to achieve that purpose it appears to us essential that as far as possible our members and others, who finance and give protection for movement of goods and services across international borders, should know with certainty to which law they should look for the purpose of ensuring that their operations are to be carried out with reasonable safety. We consider that, in order to promote such certainty, the following should be taken into consideration.

**Specific comments**

**Article 24:** For the provision of finance with reasonable confidence and at fair cost it is essential for the financier, who is relying on an assignment of receivables, to know exactly what his position will be in relation to other claimants in the insolvency of his assignor. Therefore, this article is one of the most important provisions (if not the most important provision) of the draft Convention. It seems to us that article 24 should cover priority issues in relation not only to the receivables themselves but also to their proceeds.

If the financier is to look with confidence to a single law to determine whether his rights to the receivables will survive the insolvency of the assignee he must also be able similarly to know what his position will be as regards the proceeds. As it would be most rare for those proceeds to

consist of anything other than money or instruments of payment (whether or not negotiable), it seems that for the purpose of achieving the purposes of the Convention reference only to bank deposits and such instruments is necessary. It does not seem to us necessary for the Convention to deal with other forms of proceeds.

**Articles 20 and 30:** To further the purposes of the Convention by making for certainty for the prospective financier, a choice of law rule as in article 30 is necessary. The financier must know before providing finance which law will govern the countervailing rights of the debtors. Only with this knowledge can he properly assess the risks. Article 30 would provide the financier with that certainty. However, article 30 is subject to an opt out which could cause the financier further uncertainty. Therefore, we consider that the same rule should be repeated in article 20.

It has been noted that concern has been expressed that such private international law provisions might make the Convention less acceptable to States. However, if such concerns are to take precedence over the objects of the Convention, then there might be a widely accepted convention that achieved none of its objects.

## 4. Secretariat of the Intergovernmental Organization for International Carriage by Rail

**[Original: English]**

The Secretariat of the Intergovernmental Organisation for International Carriage by Rail (OTIF) takes the opportunity to compliment the Commission and the Working Group on International Contract Practices on the excellent work accomplished with regard to the draft Convention on Assignment of Receivables in International Trade ("the UNCITRAL draft Convention").

At the first joint session of the Committee of Governmental Experts for the preparation of a draft Protocol on Matters specific to Railway Rolling Stock, held in Berne on 15 and 16 March 2001, the Governmental Experts discussed, *inter alia*, the relationship between the UNCITRAL draft Convention and the preliminary draft Protocol on Matters specific to Railway Rolling Stock ("the preliminary draft Rail Protocol"). The experts at the joint session felt unanimously that the assignment of receivables taken as security in rail financing should better be dealt within the equipment specific instrument, that is, in the UNIDROIT draft Convention on International Interests in Mobile Equipment ("the UNITROIT draft Convention"), as implemented by the preliminary draft Railway Protocol, rather than in the UNCITRAL draft Convention.

Under these circumstances, the OTIF Secretariat strongly supports the UNIDROIT Secretariat's comments on this subject and suggests that the Commission give favourable consideration to a solution along the lines proposed by the UNIDROIT Secretariat, in other words that the UNCITRAL draft Convention shall not apply to an assignment of receivables arising from an agreement which creates or provides for an interest in Railway Rolling Stock as defined in the draft Railway Protocol to the UNIDROIT draft Convention.

## 5. Secretariat of the International Civil Aviation Organization

**[Original: English]**

The International Civil Aviation Organization (ICAO) in cooperation with UNIDROIT has prepared a draft Convention on International Interests in Mobile Equipment ("the draft Mobile Equipment Convention") and a draft Protocol thereto on Matters Specific to Aircraft Equipment ("the draft Aircraft Protocol"). Those texts have been approved by the competent bodies of both organizations and will be submitted for adoption to a diplomatic conference to be held under the

joint auspices of ICAO and UNIDROIT in Cape Town, South Africa, from 29 October to 16 November 2001.

It has been strongly advocated by the parties so far involved in the intergovernmental consultations arranged by ICAO and UNIDROIT that the draft Convention on Assignment of Receivables in International Trade ("the draft Assignment Convention") should not apply to an assignment of receivables arising from an agreement which creates or provides for an international interest in, *inter alia*, aircraft objects as defined in the draft Aircraft Protocol.

It has been considered that this result can be achieved by way of:

(a) an outright exclusion of the assignment of such receivables from the scope of application of the draft Assignment Convention; or (if the draft Assignment Convention fails to do so)

(b) the inclusion of a provision in the draft Mobile Equipment Convention stating that it shall supersede the draft Assignment Convention as it relates to the assignment of receivables that are rights associated with international interests in objects covered by the draft Mobile Equipment Convention.

In view of the fact that it is not certain which convention will be adopted first, a provision along the lines of the foregoing paragraph (b) has been included in the draft Mobile Equipment Convention (article 46) as a measure to prevent any conflicts between the two conventions from arising.

The parties involved in the intergovernmental consultations arranged by ICAO and UNIDROIT have considered that this matters should be addressed in a specific provision in either one of the draft conventions at issue, rather than be left to the provisions of article 30 (on the application of successive treaties relating to the same subject matter) of theVienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969.

## 6. Secretariat of the International Institute for the Unification of Private Law

**[Original: English]**

The Secretariat of the International Institute for the Unification of Private Law (UNIDROIT) takes this opportunity to compliment the Commission and the Working Group on the excellent work accomplished at their last sessions. It notes, however, that neither of the principal proposals that it submitted to the Commission at its thirty-third session (see A/CN.9/472/Add.1 and 4) have found their way into the text of the draft Convention. It will be recalled that on that occasion the UNIDROIT Secretariat proposed, first, that due recognition be given in the preamble to the debt owed by the draft Convention to the UNIDROIT Convention on International Factoring and, secondly, that the assignment of receivables that become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the draft UNIDROIT Convention on International Interests in Mobile Equipment ("the draft UNIDROIT Convention") as implemented by the draft Protocol on Matters specific to Aircraft Equipment ("the draft Aircraft Protocol"), the preliminary draft Protocol on matters specific to Railway Rolling Stock ("the preliminary draft Rail Protocol") and the preliminary draft Protocol on matters specific to Space Property ("the preliminary draft Space Property Protocol") respectively should be excluded from the sphere of application of the draft Convention.

**Relationship between the draft Convention and the UNIDROIT Convention on International Factoring**

The Working Group has already indirectly acknowledged the debt the draft Convention owes to the UNIDROIT Convention on International Factoring (see A/CN.9/466, para. 193). The UNIDROIT Secretariat would accordingly submit that an appropriate manner in which to recognize this fact would be through the introduction in the preamble to the draft Convention of a clause indicating that it has built on the achievements of the aforesaid UNIDROIT Convention. This would have the considerable merit of alerting States coming to the draft Convention for the first time of the relationship between the two instruments as well as clarifying the intention announced at the outset by the Working Group of safeguarding the application of the UNIDROIT Convention.

**Relationship between the draft Convention and the draft UNIDROIT Convention and the draft Aircraft Protocol, the preliminary draft Rail Protocol and the preliminary draft Space Property Protocol**

In their preparation of the draft UNIDROIT Convention and the various draft and preliminary draft Protocols thereto, the authors of these texts have at all times striven to avoid entering into conflict with the draft Convention. Evidence of this concern is to be seen in the delimitation of the draft UNIDROIT Convention by reference to interests in mobile equipment protected by registration against identified assets. It is to be noted that the decision was taken early on not to go for a debtor-based registration system and not to deal with perfection requirements and priority rules relevant to receivables financing detached from the underlying asset.

The different categories of mobile equipment contemplated by the draft UNIDROIT Convention are of a kind traditionally recognised as enjoying special status. Various aspects of the structure of the proposed new international regimen correspond to the specificity of the categories of equipment covered: first, each category of equipment covered by the draft UNIDROIT Convention will be the subject of a separate Protocol, to contain those rules necessary to adapt the general rules contained in the Convention to the special characteristics particular to the financing of each such category; secondly, for the registration of each category of equipment and the establishment of priority ranking as between each such registration a separate International Registry will be created. The specificity of the assets covered by the proposed new international regimen is a key feature of the draft UNIDROIT Convention.

All three special working groups established under the authority of the President of UNIDROIT to monitor the application of the draft UNIDROIT Convention to aircraft equipment, railway rolling stock and space property and to act as a conduit for the expertise of each sector (each made up of representatives of manufacturers, users/operators and financiers as also the relevant international Organizations), namely, the Aviation Working Group, the Rail Working Group and the Space Working Group respectively, have reiterated a clear desire to see the assignment of receivables taken as security in aircraft, rail and space financing dealt with in equipment-specific instruments, that is, the draft UNIDROIT Convention as implemented by the draft Aircraft Protocol, the preliminary draft Rail Protocol and the preliminary draft Space Property Protocol, rather than in the draft Convention. They have emphasised the strong interest of their constituencies in seeing distinct regimes that would reflect aviation, rail and space financing practices and structures.

The value of assets like aircraft equipment, railway rolling stock and space property lies in the income that may be realised from their sale or lease. It would undermine the concept underlying the draft UNIDROIT Convention if the debtor could assign receivables derived from such an asset under a system different from that applicable to the pledging or other encumbering of the asset. The indivisibility of the asset and the income that may be realised from its sale or lease is enshrined in articles 7 (1) and 9 of the draft UNIDROIT Convention, relating to rights on default, and article 12, relating to interim relief.

In the case of aircraft, rail and space financing structures there is an inextricable link between the aircraft equipment, railway rolling stock and space property, on the one hand, and the associated receivables, on the other. In the case of space financing structures, for instance, much of the value placed on a satellite is derived from the various rights associated with the operation of that satellite, in particular the associated receivables. Such rights are an essential element of the commercial value of a satellite and without such rights the satellite will have very little commercial value. It is therefore appropriate for security rights relating to both the asset and the associated receivables to be subject to a common regimen, in the interest of avoiding not only conflict of laws problems but also the resultant lack of commercial predictability and increases in transaction costs.

Against the alternative solution referred to in the report on the last session of the Working Group (see A/CN.9/486, para 105 *in fine*), which would consist in allowing the draft UNIDROIT Convention and the various draft and preliminary draft Protocols thereto to supersede the draft Convention, a number of disadvantages are to be noted.

Many national legal systems currently contain assignment rules that are more in line with aircraft, rail and space financing practices than those proposed in the draft Convention. It is submitted that there is no need to disrupt such national legal systems that work well for aircraft, rail and space financing unless the resulting changes are specifically designed with their specific financing requirements in mind. As the draft UNIDROIT Convention may be adopted after the draft Convention, unsatisfactory rules may be applicable to transactions entered into in the interim. That being the case, the finalization and ratification processes relating to the draft Convention may be complicated and even delayed by virtue of aviation-, rail- and space-related objections and the need for further national and international consultations.

The alternative approach raises rather than resolves potential problems associated with sphere and temporal applications of the two instruments. Commercial predictability will decrease, resulting in increased transaction costs. Such an approach would not address the potential conflict between the draft Convention and the Geneva Convention on the International Recognition of Rights in Aircraft. In this connection, it is worth noting that the draft UNIDROIT Convention/Aircraft Protocol contain detailed provisions dealing with the co-ordination between the last two texts and the Geneva Convention.

The draft UNIDROIT Convention and the draft Aircraft Protocol are due to be adopted at a diplomatic Conference to be held in Cape Town from 29 October to 16 November 2001 and the omens for their early entry into force could not be better. The preliminary draft Rail Protocol, having already been the subject of a first session of governmental experts, held in Berne on 15 and 16 March 2001, is already well on the way to completion. In the meantime, the preliminary draft Space Property Protocol is down for discussion at the fortieth session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, to be held in Vienna from 2 to 12 April 2001, with a view to ascertaining *inter alia* the interest of the United Nations in exercising the functions of Supervisory Authority in respect of the future International Registry for space property, and the UNIDROIT Secretariat would anticipate being in a position to transmit it to Governments later in the year.

In these circumstances, the UNIDROIT Secretariat, being of the view that particular urgency attaches to the finding of a satisfactory solution to the problem of the relationship between the draft Convention and the draft UNIDROIT Convention and the different draft/preliminary draft Protocols thereto, has the honour to propose that the Commission give favourable consideration to a solution along the lines of the one that it tabled during its last session, a decision regarding which the Commission however decided on that occasion to defer, in particular so as to "allow Governments to undertake the necessary consultations with the relevant industries" (see A/55/17, para. 96 *in fine*), namely the inclusion in the draft Convention of language along the following lines:

"This Convention shall not apply to an assignment of receivables arising from an agreement which creates or provides for an interest in aircraft objects, railway rolling stock or space property as defined in the relevant Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment."

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# Draft Convention on Assignment of Receivables in International Trade

## Compilation of comments by Governments

## Addendum

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## I. Introduction

1. The first set of comments on the draft Convention on Assignment was issued in document A/CN.9/490. This note reproduces the second set of comments received by the Secretariat. Further comments will be issued as addenda to this note and in the order they are received.

## II. Compilation of comments

### 1. Colombia

**[Original: Spanish]**

**Article 19, para 7:** The words "reasonable period of time" may be understood by each party in a different way and as referring to varying time periods, which could lead to unnecessary controversies. We, therefore, suggest that, in the interest of clarity, a precise period of time should be stated.

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**Article 24:** The new proposal on the law applicable to priority conflicts with respect to proceeds clears up some uncertainties. However, its formulation may imply that there are situations that are not covered. We, therefore, suggest that consideration be given to including a rule of general application. In this context, bearing in mind that negotiable securities are transferred by endorsement and not by way of an assignment, we must stress the importance of their exclusion from the scope of the Convention.

**Regulatory powers of central banks:** To the extent general economic circumstances make it necessary, central banks should be authorized to intervene in assignments under the Convention without this entailing a violation of the Convention. Central banks and States in general have the authority to control the inflow and outflow of capital. The importance of such powers for general economic policy in any State cannot be overstated

Under article 24, the law of the assignor's location governs priority questions. It seems that it covers also capital controls. This may create a conflict with capital controls of the country from which the receivables originate. A central bank may refrain from selling foreign exchange in a particular economic situation and, in this case, it is important not only that the bank can retain this power but also that debtors are safeguarded against any effect that this measure may have on the terms in which the debt is established.

## 2. France

**[Original: French]**

### Pending issues

**Article 4, paragraph 1 (b):** France has always supported the exclusion of transfers of receivables effected by the delivery (instruments payable to bearer) or endorsement (instruments payable to order) of negotiable instruments. Such receivables are subject to a very specific legal regime characterized, in particular, by the application of the principle that defences outside the instrument cannot be invoked against the new bearer. Moreover, the Geneva Conventions of 1930 (on bills of exchange and promissory notes) and 1931 (on cheques) give a legal status to these instruments, which would be difficult to combine with the Convention being prepared by the Commission. What justifies the exclusion is not the nature of the instrument representing the receivable (bill of exchange, promissory note, cheque, etc.), but the technique of transfer, namely endorsement or delivery.

However, some negotiable securities, such as negotiable certificates of indebtedness or bonds (in French, *titres de créances négociables* or "*TCN*s") do not belong to the category of negotiable instruments. It would, therefore, be desirable to replace the reference to "effets de commerce" in the French version of article 4, paragraph 1 (b), with a reference to "instruments négociables".

An increasing number of negotiable instruments are paperless and are transferred by way of an entry into an account. These forms of transfer are often recognized as having an abstract character similar to endorsement, and their exclusion from the scope of application of the Convention would seem to be justified in the interest of uniformity with the rules governing negotiable instruments. If there is agreement on such exclusions, they should be expressly provided for in the text of the Convention. It goes without saying that, if a receivable is transferred not by a negotiation technique (endorsement or delivery, as applicable) but in the form of an assignment, there is no reason to exclude the application of the Convention.

**Articles 4, para. 4, and 41:** Permitting States to exclude further practices by way of declaration would seriously jeopardize the unifying function of the Convention. However, if the question of the protection of consumer debtors cannot be satisfactorily regulated in article 17, it would seem

essential to maintain the right of States to exclude by declaration the assignment of certain types of receivables (see comment on article 17 below). Furthermore, taking into account the remaining uncertainty as to on the application of certain provisions of the Convention to certain practices, it would seem desirable to retain the right of declaration provided for in article 41, so as to enhance the acceptability of the Convention.

**Reference to "goods" in articles 11, para. 3 (a), and 12, para. 4 (a):** The choice of the French expression "*biens meubles corporels*" to translate the English term "goods" (see A/55/17, para. 185), so as to cover only tangible, and not intangible, movable property, inevitably means adopting an unduly restrictive approach as to the scope of articles 11 and 12. Such a solution would entail excluding assignments of receivables that result from operations relating to intangible property such as the goodwill, the trade name or other name of an enterprise, or the right to a lease and the like). It is hard to see what would justify special rules for receivables resulting from operations with intangible property, particularly as the treatment of receivables connected with financial transactions is already the subject of broad exclusions. Furthermore, this approach would run counter to the policy underlying articles 11 and 12, since assignees would need to examine documents to ensure that receivables are assignable. In order to avoid that result, the word "goods" should be understood as covering both tangible and intangible movable property.

**Consumer protection issues:** As indicated above and in the comments last year (A/CN.9/472), France would insist that article 17 should include a provision ensuring that consumers are not deprived of the protection afforded to them by the law of the State in which they are located. This comment is also valid for article 6, entitled "Party autonomy". A consumer-related problem may arise also in article 19, paragraphs 5 to 7. When the debtor is a consumer, the debtor should always be allowed to be discharged by paying the initial creditor.

Article 17, in particular, seems incompatible with domestic provisions of public policy which protect the consumer in the area of consumer credit and from which the assignee may not derogate even with the consent of the consumer. It is essential that article 17 makes it clear that the Convention does not allow a consumer debtor to vary or derogate from a contract if such variation or derogation is not permitted by the law applicable to consumer protection (see document A/55/17, para. 171-172). If this proposal is not adopted, some States, including France, may have to simply exclude assignments of consumer receivables from the scope of the Convention, which would deprive it of much of its usefulness.

**Article 24, paragraph 1 (b) and (c):** The question of the right of an assignee in proceeds is one of the issues that gave rise to the longest and most complicated discussions in the Working Group. Briefly, the question is whether the assignee has a right in financial instruments or other assets given in payment of the assigned receivable and, if so, whether that right is a personal or a property right. In view of the wide differences among the various legal systems, the Working Group did not find it possible to agree on a substantive law rule with respect to proceeds. The notion of "proceeds" is foreign to many legal systems and introduces chganges that may discourage States from adopting the Convention. In addition, it seems impossible to define it in a way that would remove any uncertainty as to the consequences of the application of article 24, paragraph 1 (b) and (c). It would, therefore, be desirable to exclude the idea of "proceeds" from the Convention and to delete article 24, paragraph 1 (b) and (c).

**New provision on form in chapter V:** On the question of the law applicable to the formal validity of an assignment, article 8 differs from the Rome Convention on the Law Applicable to Contractual Obligations (see article 9) particularly in creating a rebuttable presumption in favour of the law of the location of the assignor as the law most closely connected with the contract of assignment, without requiring an explicit choice of applicable law. In view of the differences between the criteria adopted in the Rome Convention and in the UNCITRAL draft, any provision on this subject must be dealt with directly in chapter V, whose optional character would permit future signatory States to avoid a conflict of private international law rules that could impair the aim of foreseeablility desired by the parties and by third parties.

**The possible inclusion in article 20 of a provision along the lines of article 30:** France has no objection to allowing States that so wish to adopt chapter V only in part. However, the proposal to include in article 20 a rule along the lines of article 30 causes France serious concerns. This proposal, which would mean introducing a provision of an optional nature into the body of the Convention, is not acceptable, because the suggested text would overlap (and might even conflict) with the provisions of the Rome Convention on the Law Applicable to Contractual Obligations.

**Potential conflicts with other conventions:** France notes with concern that the relationship between the Convention and the Convention and Protocols being prepared by UNIDROIT jointly with other organizations has not been settled yet. In view of the fundamental differences between the two texts, it is urgent to address their relationship so as to avoid conflicts. France favours a limited or partial exclusion of the application of the Convention where the UNIDROIT Convention actually applies. For the reasons explained before the Commission or the Working Group, France considers that it would not be desirable to exclude receivables relating to mobile equipment, in general, from the scope of the UNCITRAL text. However, paragraph 1 of article 38 concerning conflicts with other international agreements is not well adapted to the UNIDROIT Convention, because it declares that Convention to be applicable even when it is not. A more precise provision taking into account the foregoing should therefore be added to article 38.

**The annex:** Priority rules based on the time of the contract (section III of the annex) are viewed with favour in France. It would be useful to supplement articles 6 and 7 of the annex in order to regulate the question of proving the date of an assignment. Three complementary solutions could be considered. The date of the assignment may be proved by any method; if the date is disputed, it is the responsibility of the party claiming priority to prove it; if the assignor is subjected to an insolvency proceeding, the assignee must show that the proceeding was opened subsequently to the assignment under which the assignee claims a right. As to the mechanism for the establishment of the registry and the appointment of the supervising authority and registrar, France is not ready to adopt the registration system and, therefore, sees no need to take a position on the technical modalities for such a registration system.

**Procedure for the final adoption of the Convention**: For practical reasons, preference should be given to adoption by the General Assembly.

### Additional issues

**Definition of location:** Referring to its comments on the definition of "location" last year (A/CN.9/472), France stresses that those comments remain valid. Article 24, paragraph 1 (b) (iii), which opts for the law of the location of the bank in the case of bank deposits, continues to cause uncertainty. In the case of sectors organized by branch offices, it would not be appropriate to have the questions of priority relating to operations that an enterprise carries out through a branch in one country governed by the law of another country where the enterprise has its head office or central administration. This applies in particular to the banking sector in which the conditions under which bank branches are authorized to operate and the particular constraints that they face concerning both their mode of refinancing and their prudential rules, require their being placed under a regime linked to the law of their location. France considers, therefore, that it would be desirable to state that article 24 refers not to the law of the location of the head office (or central administration) but to the law of the location of the branch concerned.

**Non-contractual receivables:** Article 2 (a) leaves outside the scope of application of the Convention receivables of a non-contractual nature, such as rights to payment under requests for reimbursement of taxes, the assignment of which forms part of important financing practices at the present time. France has always considered, and pointed out in its comments last year, that a broader definition of the concept of "receivables" would make it possible to reduce differences in

the interpretation of the expression "contractual rights" in different legal systems. For these reasons, it would be desirable to include this type of receivable in the scope of application of the Convention through the introduction of an optional system for States, in the form of a declaration. Such an approach would avoid the need to reconsider, at this stage in the negotiations, a number of provisions already drawn up to govern assignments of contractual receivables exclusively.

**Article 1, para. 4:** Article 1, paragraph 4 does not make clear which State has to make a declaration for the annex to apply. As a result, several parallel systems may coexist under the Convention for establishing priorities among competing assignees. For example, if a conflict arises before the courts of State A between an assignment with priority according to the law of State A (which has opted for the priority rules based on the time of registration, sections I and II of the annex) and another assignment with priority according to the law of State B (in which the assignor is located and which has opted for the priority rules based on the time of the contract of assignment, section III of the annex), it is not clear which law would apply, that of State A (section I) or that of State B (section II).

It seems obvious that it should be the law of the location of the assignor that determines what system of priority is applicable in a Contracting State in conformity with article 1 (a), which governs the scope of the Convention's application. However, the text of the Convention is not sufficiently clear about this. Article 42, concerning the application of the annex, confines itself to indicating that "a State may ... declare that it will be bound either by sections I and II or by section III of the annex to this Convention". Paragraph 2 of article 42 stipulates that, for the purposes of article 24, the law of a contracting State that has made a declaration pursuant to the provisions mentioned earlier is the set of rules set forth in either section I of the annex or section III. Under article 1, paragraph 4, the annex applies in a Contracting State that has made a declaration under article 42. It is, therefore, proposed that article 1, paragraph 4, should be amended as follows: "The annex to this Convention applies to the assignments referred to in a declaration made under article 42 by the Contracting State in which the assignor is located."

**Relationship between the draft Convention and Regulation (EC) No. 1346/2000 of the Council of the European Union of 29 May 2000 on Insolvency Proceedings**

At its last session, the Working Group noted that there is no conflict between the Convention and the Regulation of the European Union on Insolvency Proceedings (see A/CN.9/486, para. 107). However, this does not seem to be sufficient to establish compatibility between the draft Convention and the European Union Regulation. Article 24 of the Convention refers conflicts between an assignee and an insolvency administrator to the law of the location of the assignor. Articles 5 and 2 (g) of the European Union Regulation refer the matter to the law of the centre of the main interests of the debtor affected by the assignment. There is thus an incompatibility, or at least an apparent one, between the two instruments. It would be desirable for this point to be clarified.

It might also be desirable to make clear to what extent the Convention could affect the situation of holders of rights in a secondary insolvency proceeding rather than in a main insolvency proceeding, since the European Union Regulation, in principle, provides for the same effects for the two types of proceeding. It would also probably be clearer to state that the insolvency proceedings referred to in article 25 of the Convention are proceedings opened against the assignor, unless it is felt that article 5 of the Convention is sufficient.

**Article 38, para. 2:** Article 38, paragraph 2, still refers to the "time of the conclusion of the original contract". This formulation may be unfortunate in that a contract for the assignment of receivables may be signed on one date while the actual assignment of receivables may take place later. This is often what happens in practice.

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# Draft Convention on Assignment of Receivables in International Trade

## Compilation of comments by Governments and international organizations

## Addendum

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## I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490 and A/CN.9/490/Add.1. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

## II. Compilation of comments

### 1. Association of the Bar of the City of New York

**[Original: English]**

**General comments**

The Committee on Foreign and Comparative Law (Committee) of the Association of the Bar of the City of New York (Association) submits these comments in connection with the ongoing

work of UNCITRAL regarding assignment of receivables. The Committee has followed closely UNCITRAL's work on this project, and a member of the Committee, has acted as an observer to the Working Group in International Contract Practices for the past several years as the Working Group has continued its efforts to refine the draft Convention on this subject.

The Committee commends the efforts of the Working Group and the Commission on this important project, and looks forward to a continued cooperation with the Commission as the draft Convention moves toward completion and adoption. The Committee is confident the Commission will achieve a Convention acceptable to all delegations that will be successfully adopted by many jurisdictions and will comprise a significant positive contribution to international commerce.

**Specific comments**

**Title:** The Committee believes that, within the parameters of its final negotiated scope, the Convention should be given the broadest possible interpretation and application. In this regard the Committee believes that the preferred title of the Convention would be the "Convention on Assignment of Receivables".

**Article 4, paragraph 1:**. The Committee believes that the exclusion of the transfer of negotiable instruments in article 4, paragraph 1, of the Convention should also refer to transfers of negotiable instruments made by book entry in a depository's accounts (without delivery or endorsement) and should include transfers by mail delivery without a necessary endorsement. Appropriate language explicitly including such transfers within the scope of the exclusion should be added to article 4, paragraph 1. The commercial law, both statutory and decisional, of many States governing negotiable instruments, including the assignment thereof, is well-developed. These legal regimes have evolved with commercial practice and contain attributes particularly suited to the unique characteristics of negotiable instruments. The Committee believes that including negotiable instruments within the scope of the Convention would be unnecessarily duplicative of these established legal regimes and perhaps also of other international conventions and projects. Further, the unique attributes of negotiable instruments require specialized rules and approaches that would unnecessarily be disrupted if the Convention were to apply.

**Article 4, paragraph 2**: The Committee similarly strongly believes that foreign exchange contracts and arrangements, to the extent not already excluded from the scope of the Convention, should be excluded. The Convention would not benefit this market and, given the wide variety of arrangements existing in this market, application of the Convention to this market would have the potential to cause great uncertainty to existing international banking and commercial transactions involving foreign exchange.

The Committee briefly considered whether claims by or against a decedent's estate or otherwise exercisable by means of a will or other testamentary document, which claims would otherwise qualify as "receivables" under the Convention, should fall within its scope. The question is, for example, whether, if a United States resident decides to transfer a claim against her father's estate to her nephew in France, the assignment should be subject to the Convention. Generally speaking, the laws governing estates are expected by participants to be those applicable to probate or intestate administration and under which wills are drafted or estate planning is developed. It would also seem that such receivables would not comprise a significant element of cross-border commerce. Although the Committee has not explored this issue in depth, our initial reaction is that such claims should be excluded from the Convention's scope.

**Article 5 (h)**: In the case of branch offices of banks and other financial institutions that are not separately incorporated or organized from their "parent" institution but are located in a State other than the State of incorporation/organization of the "parent" the issue of branch location is important under the Convention. The Committee believes that branches should be considered located in the State in which they are physically present, notwithstanding the presence of the "parent's" organization in another State. Branches of banks and other financial institutions

located outside of their "home" jurisdictions generally are subject to regulation by the competent authorities of the State in which they are located. Although clarity from a choice-of-law perspective could be accomplished by deeming a branch to be located either in the State of its physical presence or the State of incorporation/organization of its "parent" the Committee believes the better approach would be to deem for purposes of the Convention a branch to be located in the State of its physical presence, both so that the Convention's approach to a branch is consistent with the approach of the relevant regulatory authorities (i.e., authorities of the State of such physical presence) and also so that the Convention treats in the same way all banks and other financial institutions located in a particular State, regardless whether such entities are branches or locally organized subsidiaries.

**Consumer protection issues:** The Committee believes that the Convention does not need to be explicit in stating that it does not empower a consumer debtor to vary or derogate from a contract with an assignor if such variation or derogation would not be permitted by applicable consumer protection laws. The provisions in the Convention do not lend themselves to such an interpretation and lenders would not accept the risks inherent in such a liberal reading of the text. Nevertheless, if the Commission believes that such a misinterpretation is possible, the Committee believes it is appropriate to address this issue in the commentary, rather than in the text, of the Convention. The Committee believes the foregoing approach is preferable to amendments to the text of the Convention. However, if the Commission believes that changes to the text are necessary, the Committee believes it would be appropriate to address this issue as proposed by the Secretariat by adding text to article 4 and revising articles 21 and 23 (see A/CN.9/491, para. 40).

**Article 24, paragraph 1 (b) and (c):** Although we are cognizant of the issues raised by certain civil law jurisdictions regarding the separate treatment of receivables and the proceeds thereof under applicable law, the Committee believes it quite important that all proceeds of receivables should be included within the scope of the Convention. Stating it differently, if a receivable is covered by the Convention, any proceeds of such receivable also should be covered by and subject to the Convention. Further, the Committee believes that proceeds of covered receivables should fall within the scope of the Convention even if, by their nature, such proceeds would have been excluded from the Convention if they were simply receivables in their own right (and not proceeds of covered receivables). For example, if a group of trade receivables from a single obligor transferred to a financier were thereafter replaced by a promissory note from the obligor to such financier, such negotiable instrument would nevertheless be within the scope of the Convention.

To the extent the foregoing would raise issues not addressed by the Convention (for example, priority issues relating to negotiable instruments comprising proceeds), such issues could be left to be resolved under law and other treaties specifically applicable thereto. In accordance with the foregoing, the Committee believes that article 24 (b) and (c) are unnecessary and may be deleted from the Convention. As noted above, particular issues left unresolved by this approach (for example, the dispositions of securities held through indirect holding systems) can be left to be resolved by laws outside of the Convention. In this respect the Convention will not be entirely silent, if the Convention (through article 24, paragraph 1 (a)) would look to the law of the State where the assignor is located (which law itself could point to other laws or treaties for resolution of issues).

**Articles 24 and 31**: Concerns have been raised in the Committee that, although it would not be the best interpretation, articles 24 and 31, in directing that the law of the State in which the assignor is located shall govern certain aspects of the rights of a competing claimant, could be construed to overcome or undo a choice of law made by the assignor and the assignee otherwise applicable pursuant to article 29, paragraph 11 (or perhaps also overcome or undo the law applicable in the absence of such a choice of law pursuant to article 29, paragraph 2). The law applicable to the relationship between third party claimants and assignors, as determined pursuant to articles 24 and 31, should not have an impact on the law applicable to the relationship between assignors and assignees, as determined pursuant to article 29. Although we do not believe that

the text of the Convention needs to be changed, the Committee believes it would be appropriate to add a clarifying statement in the commentary that articles 24 and 31 are not meant to and should not be construed so as to overcome the law applicable as between the assignor and assignee under article 29. We note that this concern may be affected by other potential modifications to article 24, but believe the concern will remain and that the suggested commentary will remain a useful addition.

**New provision on form in chapter V:** Regarding the question of whether to include in chapter V of the Convention a provision to address the law applicable to the formal validity of the assignment and to the contract of assignment itself, the Committee believes that the inclusion of provisions clarifying the law applicable to such matters would be appropriate. The Committee concurs with the suggestion of the Secretariat (see A/CN.9/491, para. 21) to include language similar to that found in the Convention on Contracts for the International Sale of Goods.

**Article 38:** The Committee believes that it is inappropriate for it to comment on the prevalence of one international agreement over another, as that seems to be the province of States and not NGOs. We note, however, that as a practical matter, we would prefer to have this Convention prevail over the draft Convention on International Interests in Mobile Equipment and the relevant equipment-specific protocols being prepared by UNIDROIT, as this Convention appears to be less restrictive for both borrower and lender.

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# Draft Convention on Assignment of Receivables in International Trade

## Compilation of comments by Governments and international organizations

## Addendum

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## I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490, A/CN.9/490/Add.1 and A/CN.9/490/Add.2. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

## II. Compilation of comments

### Germany

**[Original: English]**

**General comments**

The Federal Republic of Germany welcomes the continuation of discussions on the Draft Convention on Assignment of Receivables in International Trade. The Federal Republic should

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like to express its gratitude to all participants, and especially to the UNCITRAL Secretariat, for the preliminary work carried out and for the positive spirit in which the discussions were conducted.

**Specific comments**

**Relationship with other texts**: At present, there are numerous projects in the international and European arenas designed to unify substantive and private international law in respect of the law on assignment of receivables and of secured credit law in general. By way of example, reference may be made here not only to the UNIDROIT Convention on International Interests in Mobile Equipment but also to the work of the Hague Conference concerning the draft Convention on the law applicable to dispositions of securities held through indirect holding systems. In addition to those texts, there is the European Council Directive on settlement finality in payment and securities settlement systems and also the prospective directive on the use of securities as collateral for credit.

The Federal Republic of Germany is concerned about the fact that the interrelationship of these various projects has not yet been clarified. The current projects differ in their approaches because in some cases they differentiate according to collateral and in others according to transferor or transferee. Here there is no failure to appreciate the fact that the UNCITRAL Convention has a more extensive scope of application. Furthermore, the Federal Republic of Germany sees an urgent need for consultation to avoid contradictions between the provisions concerned.

**Articles 1 to 17**: Articles 1 to 17 of the Convention have already been discussed by the Commission and have been accepted in principle. Discussions should not be resumed here unless there is a compelling reason for doing so.

There are, however, misgivings as to whether the definition in respect of the "location" of person to whom the Convention is intended to apply takes adequate account of the needs arising. According to article 5 (h) a person is located in the State in which it has its "place of business". If the assignor or the assignee have places of business in more than one State, the place of business is where the assignor or the assignee has its central administration. This provision overlooks the fact that, for instance, providers of financial services (banks) make assignments in many locations in various countries where there is no connection at all with the central administration and therefore with the law of the place of central administration. This problem is becoming increasingly relevant in the European Union where not only banks or insurers but also other large enterprises with a chief executive office in one member conduct business through legally dependent structures in other member States of the European Union. The Federal Republic of Germany therefore considers it necessary for the present provision made in article 5 (h), third sentence, to be applied not only to the debtor but also in general terms to assignors and assignees.

**Article 19**: The delegation of the Federal republic of Germany has repeatedly expressed its concern that article 19 might considerably decrease the level of debtor protection existing under national law. The Working Group did not share this concern. The Commission should therefore have a renewed discussion of the problems emanating from article 19, paragraphs 5 to 7.

**Consumer protection**: In the foregoing context, but not only confined to article 19, there should be also a discussion of the question whether and to what extent the rules of domestic or of Community law relating to consumer protection take precedence over the provisions of the Convention.

**Article 24**: The Federal Republic of Germany is not convinced that the provisions concerning priorities in respect of proceeds are adequate. Article 24 paragraph 1 (b) is difficult to understand and will hardly help in practice. The problems become apparent if article 24 of the Convention is compared with article 4 of the Hague Conference draft Convention on the law

applicable to dispositions of securities held through indirect holding systems. Here there is the risk of contradictory provisions and interpretations.

Against this backdrop, consideration must be given to whether a provision on rights to proceeds should be included in the Convention. The Federal Republic of Germany sees no need for article 24 paragraph 1 (b).

**Article 39**: Contrary to the express proposals made by the German delegation, article 39 has been formulated as an opt-out rule and not as an opt-in rule for the application of chapter V. This may not represent a great difference. Nevertheless, this is significant for the Convention's acceptability to States that may not need chapter V.

Independently of this matter, it is suggested that in article 39 provision also be made for Contracting States to adopt only parts of chapter V. This change would seem to be important particularly in regard to the content of article 30, but also in regard to the content of articles 32 and 33.

* * *

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# Draft Convention on Assignment of Receivables in International Trade

## Compilation of comments by Governments and international organizations

## Addendum

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## I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490, A/CN.9/490/Add.1, A/CN.9/490/Add.2 and A/CN.9/490/Add.3. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

## II. Compilation of comments

### 1. European Federation of Factoring Associations

**[Original: English]**

The European Federation of Factoring Associations (EUROPAFACTORING) compliments UNCITRAL for the work done and the results accomplished so far, expecting that the fruitful

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debate carried on so far will now reach a final positive result. In its comments on the latest draft, Factors Chain International (FCI) already pointed out the importance of certainty for the financier as to which law is applicable (see A/CN.9/490), and we certainly join FCI in stressing this point important not only to factors but to all financiers worldwide. We also express our appreciation to the Secretariat for the thoughtful commentary on the draft Convention. Its well founded explanations made it easier for all to understand the complexity of the problems dealt with in the draft Convention.

**Specific comments**

**Article 8:** Article 8, which is intended to give certainty to the assignee as to which rules are to be followed with respect to form, is a "safe haven" rule (if form requirements of the place of location of the assignor are fulfilled, the assignment is as to "form"). However, form in article 8 may be too broad. Whether or not an assignment has to be notified to the debtor may be a matter of form covered in article 8, although it is already dealt with in the Convention (article 9), and no such notification is required under the Convention. Furthermore, if under the law of the assignor's location priority is determined on the basis of notification, the question arises whether such notification has to follow the rules of the Convention or of other law. The current version of article 8 leaves room for discussion on this issue. We would therefore suggest that the matter be clarified in either article 8 or in article 24.

**Article 38, paragraph 2:** We reiterate our support for the policy of article 38, paragraph 2. The draft Convention should take precedence over the Ottawa Convention, whenever both conventions are applicable, but should not preclude the application of the Ottawa Convention if the draft Convention does not apply with regard to a particular debtor. The second sentence of article 38, paragraph 2 may not be sufficient to achieve the latter result. We therefore suggest that it be reformulated along the following lines: "To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to that debtor".

## 2. Financial Markets Lawyers Group

**[Original: English]**

The Financial Markets Lawyers Group welcomes this opportunity to provide further comments on the draft Convention. We applaud the continued efforts of the Commission to facilitate greater cross-border trade financing and, as we noted in comments last year (see A/CN.9/472/Add.1), we believe that adoption of the draft Convention will lead to greater harmonization of the rules currently governing cross-border transactions.

We appreciate the Commission's responsiveness to our previous concerns and we feel that the draft Convention addresses many of the issues that we raised about the impact of the draft Convention on the international over-the-counter (OTC) financial markets. We would, however, like to raise a few additional points that we believe would improve the draft Convention and contribute to the legal certainty and clarity under which these markets operate.

**Article 5 (k) and (l)**: While we believe that the draft Convention's definitions of "financial contract" and "netting agreement" cover almost all of the agreements that should be excluded from the draft Convention, the following clarifications of the scope of these definitions would contribute to legal certainty for the transactional arrangements of participants in the OTC financial markets.

With respect to "financial contract," as we noted in our comments last year supporting the comments of the European Banking Federation ("EBF"), we believe that the definition should

include reference to the collateral and credit support arrangements used by counter-parties to manage their counter-party credit risk in connection with the other enumerated "financial contracts." Typically, these collateral and credit support arrangements are documented under the same industry standard master agreements governing the trading of "financial contracts" and related netting provisions and operate pursuant to the set-off and netting provisions of these master agreements. Exclusion of such collateral and credit support arrangements from the draft Convention, would lead to further certainty and predictability with respect to the set-off and netting provisions of the standard market agreements pursuant to which these important risk management arrangements operate. Language along the following lines could be used in article 5 (k): " 'Financial Contract' means any spot...and any combination of the transactions mentioned above, *and any and all collateral and credit support related to any transaction mentioned above;* (this language is based on the EBF proposal last year; see A/CN.9/472/Add.1).

With respect to "netting agreement," we believe that it would be desirable to clarify that the draft Convention should not apply to receivables arising out of multilateral netting arrangements such as those used by payment and securities settlement systems. Allowing the assignment of these multilateral netting payments is likely to substantially undermine the fluid operations of such systems and impair the certainty and finality of settlements. As such, we suggest that the definition of "netting agreement" should clearly include netting arrangements between two or more parties. Language along the following lines could be used in article 5 (l): " 'Netting agreement' means an agreement *between two or more parties* that provides for one or more of the following:

(i) The...or otherwise;
(ii) Upon...and netting into a single payment by *or to the defaulting party*; or
(iii) The set-off...netting agreements;"

In addition, as discussed in our comments last year, we understand that "netting agreements" include within its scope agreements that provide for the close-out of some but not all transactions in certain situations such as where it may be in contravention of relevant law to close-out certain transactions. The commentary may usefully clarify this matter.

Finally, regarding whether or not issues of priority with respect to certain types of assets, the assignment of which has been excluded from the draft Convention, should be addressed if those assets are proceeds of receivables which would be subject to the draft Convention, we support the last alternative described by the Secretariat in document A/CN.9/491, para. 10. The commentary could elaborate on the PRIMA approach and cite its growing acceptance. This approach would have the advantage of avoiding potential language conflicts with any forthcoming text from the Hague Convention. We believe that PRIMA represents the consensus approach in this area and would minimize uncertainty in cross-border transactions.

We urge the Commission to include these changes so that the OTC financial market retains clarity and certainty with respect to the expectations of market participants. These changes will ensure that the legal basis under which parties transact in this market is not undermined and that the techniques for managing counter-party credit risk continue to allow counter-parties to appropriately manage their exposures. Again, we commend the Commission's efforts to develop a legal regime under which global trade financing can better flourish, and we acknowledge the care that has been taken thus far to supply the proper treatment of OTC financial market transactions.

* * *

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# Draft Convention on Assignment of Receivables in International Trade

## Compilation of comments by Governments and international organizations

## Addendum

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## I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490 and Addenda 1 to 4. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

## II. Compilation of comments

### Canada

**[Original: English/French]**

Canada submits the following comments on the draft UNCITRAL Convention on the Assignment of Receivables in International Trade. We would stress that the draft Convention is

more likely to be accepted by a large number of States if its main provisions, in particular the priority rules, are simple and easy to understand and to apply. To that end, we would encourage the Commission to consider simplifying the language where possible in the course of its review of the text at the 34th session.

**Negotiable instruments (article 4.1 (b)):** The current wording of article 4.1 (b) does not fully reflect the policy that the draft Convention should not impair the rights of a person under the special laws applicable to negotiable instruments. On the other hand, this wording might have the unintended result of excluding receivables from the draft Convention merely because they would be evidenced by negotiable instruments, even in instances where there would be no interference with negotiable instrument law. Accordingly, article 4.1 (b) should be replaced by a provision better expressing its underlying policy, such as the following:

> "Nothing in this Convention affects the rights of a person under the **[special]** laws applicable to negotiable instruments."

We also believe that one should not attempt to define "negotiable instrument" or "securities" and that these matters should be left to national law. However, the provisions of the Convention referring to securities should use the term "securities" instead of "investment securities".

In another vein, we do not see a need to deal specifically with transfers of negotiable instruments by entry in the books of a depository. Most of the time, negotiable instruments so indirectly held will be considered as "securities" under domestic laws. The exclusions of articles 4.2 (d) and 4.2 (f) would then apply. On the other hand, one should not exclude transfers of negotiable instruments which are not securities on the sole ground that they are held by a depository, if the transfer does not constitute negotiation under domestic law.

**Consumer protection:** The policy approved by the Commission with respect to consumer protection issues would be better reflected by a general provision stating that:

> "Nothing in this Convention affects the rights and obligations of the assignor and the debtor under the **[special]** laws governing the protection of **[parties to] [persons in]** transactions made for personal, family or household purposes."

With this new language, the "without prejudice ..." proviso of articles 21.1 and 23 would be unnecessary and should be removed. Note that the language above refers to any applicable consumer protection law, and not only to consumer protection law in the state in which the debtor is located.

**Time of the assignment (article 10):** Previously, certain provisions of the draft Convention referred to the time of the assignment. These provisions were changed to make reference to the conclusion of the contract of assignment (e.g. article 3). We propose the deletion of article 10, which now serves no useful purpose and could create confusion.

**Applicable law in territorial units (article 37):** The proposed text for article 37 provides a useful clarification for federal States in which matters dealt with by the choice of laws rules of chapters IV and V are not governed by federal laws. However, we question the appropriateness of incorporating for all States the internal conflict rules of the relevant territorial unit. Instead of stating in the draft Convention a rule providing for internal *renvoi*, one might permit a Contracting State that wishes to adopt such a rule to make a declaration to that effect.

**Law applicable to the formal validity of assignments (article 8 and possible new provision in chapter V):** The Commission has been asked to consider the incorporation in chapter V of a provision along the lines of article 8 which addresses the law applicable to the form of an assignment. We have concerns with the scope of article 8 as currently formulated.

Article 8 refers the formal validity of an assignment to the law of the State in which the

assignor is located, but also preserves the choice of law rules of the forum if those rules would refer formal validity to a different law. In our view, this approach creates a potential conflict with the policy underpinning the choice of law rule in article 24. In the interests of certainty and predictability, article 24 requires the exclusive application of the law of the assignor's location for issues relating to the priority of the assignee's interest. Yet certain requirements which might be characterized as relating to the "formal validity" of an assignment – e.g. notarial or writing or registration requirements – may also be characterized as relating to "priority"; for example, where such requirements constitute pre-conditions under the law of the assignor's location to the effectiveness of the assignment as a property right or to the right of an assignee to claim priority in the assigned receivable against competing claimants. This risk of overlap between articles 8 and 24 means that third parties, including prospective assignees, will be unable to predict whether an assignment which is formally invalid by the law of the assignor's location might still be held valid if the litigation happens to be heard in a state which refers formal validity to a different law with different formality rules.

Our concerns would be resolved if article 8 were limited to the determination of the law applicable to formal validity only insofar as this is relevant to the reciprocal rights and obligations of the assignor and assignee under their contract of assignment. The utility of such a limited choice of law rule is questionable, however, and it may be preferable to simply delete article 8.

**Law applicable to the "characteristics and priority" of the right of an assignee in the assigned receivable; meaning of the "characteristics of a right"; definition of "priority" (article 24, para. 1(a), 2; article 5, para. (g) (and corresponding provisions in article 31):** We are concerned that the provisions of the draft Convention designating the law applicable to the priority of the assignee's right in the assigned receivable are both opaque and incomplete. The meaning of the current reference to "the characteristics" of the assignee's right in para. 1 (a) of art 24 (and in art. 31) is not self-evident. The attempted clarification in para. 2 is also unclear. We suggest stating simply that the "priority of the assignee's right" against competing claimants is governed by the law of the assignor's location. At the same time, we think that the priority-related issues governed by the law of the assignor's location should be more clearly delineated to explicitly include the following (where relevant to the determination of priority):

(1) the legal nature of the right of the assignee in the assigned receivable (including whether it is a personal or property right, and whether it is an absolute right or a security right);

(2) any steps necessary to render the assignee's right in the assigned receivable effective against competing claimants (perfection); and

(3) the ranking of any person's title or claim to the assigned receivable as against any competing title or claim.

**Law applicable to "characteristics and priority" of assignee's and competing claimants' rights in certain categories of proceeds (article 24, paras. 1 (b) and 1 (c) and corresponding provisions in article 31):** We have concerns with the retention in the draft Convention of the choice of law rules in paragraphs 1 (b) and 1 (c) of article 24, currently in square brackets (and the corresponding provisions in article 31). These rules designate the law applicable to the "characteristics and priority" of the rights of an assignee or a competing claimant in proceeds of a collected receivable which take the form of negotiable instruments, investment securities held through a securities intermediary, and bank deposits. We do not think it is feasible, in the limited time available to the Commission, to achieve agreement on appropriately refined and internationally acceptable choice of law rules in these areas. We fear that any attempt to do so may endanger the overall acceptability of the Convention. In this connection, we note that assignments of these categories of intangibles were excluded from the Convention: see article 4, para. 1 (b), 2 (e) and (f). It was thought that the development of a uniform international legal regime, including a uniform international choice of law regime for issues of priority, constituted a separate unification project in itself. This consideration applies equally to the designation of the law applicable to priority in the relevant categories of assets when they constitute proceeds of

receivables since the choice of law rules would have to be identical to the rules applicable to the priority of a right in such assets acquired by an assignee under a direct assignment.

We would therefore prefer to replace the square-bracketed language in paragraphs 1 (b) and (c) of article 24 (and the corresponding language in article 31) with a provision along the following lines: "The priority of an assignee's claim to proceeds is governed by the law applicable by virtue of the rules of private international law." Such a provision would confirm that the choice of law rule in article 24 (and article 31) of the draft Convention for priority in the assigned receivable does not necessarily apply to priority in the proceeds of collection of the receivable. At the same time, the way would be left open for reference to be made to future international law texts to supply the appropriate choice of law rule (see, for instance, the work currently underway in the Hague Conference on Private International Law on an international convention to determine the law applicable to the proprietary aspects of dealings in securities credited to a securities account with a securities intermediary).

**Special proceeds priority rule (article 26, para. 2):** Under article 26, para 2, an assignee who has a first priority in the assigned receivable under the applicable law as designated by article 24 also has priority in any proceeds received by the assignor, provided that the proceeds are "held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor." The example is then given of "a separate deposit account containing only cash receipts from receivables assigned to the assignee."

We are concerned that the current formulation leaves it unclear whether the "reasonable identifiability" requirement is to be tested objectively or subjectively. Is it enough if the assignor keeps the proceeds segregated from the assignor's other assets, as in the case of proceeds deposited in a separate bank or securities account, even if the assignor is the "apparent owner" of the proceeds in the eyes of third parties? Or must the proceeds be held by the assignor in such a way that a third party would be put on notice without further inquiry that they did not form part of the assignor's patrimony ( for example, proceeds deposited by the assignor in a bank account designated on its face as a "trust" account, or in a bank account held in the joint names of the assignor and assignee)?

We think that the wording needs to be clarified to confirm the intent. If it is decided that a "subjective" test should be sufficient, then we have the further concern that the rule does not adequately protect third parties who take a direct interest in the proceeds (e.g. via an assignment of a securities account containing proceeds) in reliance on the assignor's "apparent ownership". This concern arises because the law applicable to the priority of the right of the assignee in the assigned receivable under the Convention (the law of the assignor's location) may differ from the law applicable to the priority of competing claims in the relevant kind of proceeds. Yet a third party who takes an interest in an asset, e.g. a securities account, in ignorance of the fact that it constitutes proceeds of the collection of a receivable would normally assess its priority position according to the law governing priority in the particular category of asset, not according to the law applicable to priority in the assigned receivable.

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## Receivables Financing

# Draft Convention on Assignment of Receivables in International Trade: comments on pending and other issues

**Note by the Secretariat**

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## I. Introduction

1. At its thirty-third session, the Commission adopted the title, the preamble and articles 1 to 17 of the draft Convention on Assignment of Receivables in International Trade.[1] The remaining articles of the draft Convention that were referred back to the Working Group on International Contract Practices were adopted by the Working Group at its last session (Vienna, 11 to 22 December 2000).[2]

2. As indicated by the bracketed language in the text of the draft Convention or by references below to the report of the Commission or of the Working Group, no final conclusion was reached on certain issues. In addition, certain other issues are raised by the Secretariat with the question whether the relevant provisions are sufficient to meet their stated objectives. This note has been prepared in order to give delegates to the Commission advance notice of those issues and of alternative ways in which they could be addressed. It is hoped that such advance notice will assist the Commission in resolving those issues in a timely manner and finalizing the draft Convention within the limited time that will be available to the Commission.[3]

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[1] Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 180-183; UNCITRAL Yearbook, vol. XXXI: 2000.

[2] Ibid., para. 186. The consolidated text of the draft Convention appears as annex I to the report of the Working Group (A/CN.9/486).

[3] The draft Convention is to be discussed from 25-29 June and, if necessary, on 2 July 2001. The drafting group may have to work until 5 July and the adoption of the report of the drafting group may have to take place on 5 July, depending on the time needed for the Commission and the drafting group to complete their work.

# II. Comments

## A. Articles 18 to 47 and Annex: issues referred to the Commission by the Working Group

### 1. Characteristics and priority of the assignee's right in proceeds (article 24, para. 1 (b))

**General remarks**

3. At its last session, the Working Group decided to retain article 24, paragraph 1 (b), within square brackets referring to the Commission the question whether it should be retained and, if so, in what form (see A/CN.9/486, para. 61). In determining whether to retain article 24, paragraph 1 (b), or not, the Commission may wish to take into account the relationship between articles 24, paragraph 1 (b), and 26, the real import of article 24, paragraph 1 (b), and its acceptability.

**Relationship between articles 24, paragraph 1 (b), and 26**

4. With the current structure of articles 24, paragraph 1 (b), and 26, their relationship is not very clear. While they both deal with proceeds, article 26 is a substantive law rule and article 24, paragraph 1 (b), is a private international law rule. Article 26 covers the specific situations in which payment is made to the assignee or to the assignor but the assignor holds the proceeds in a separate account on behalf of the assignee. It would, therefore, seem that article 24, paragraph 1 (b), would cover situations in which payment is made to the assignor or to another person and proceeds of the assigned receivable are commingled with other assets of the assignor or that other person. If the Commission decides to retain article 24, paragraph 1 (b), it may wish to recast it in a new provision combining articles 24, paragraph 1 (b), and 26.

**Limitations of article 24, paragraph 1 (b)**

5. As mentioned, article 24, paragraph 1 (b), would apply in the case of proceeds that are commingled with other assets of the assignor. However, if proceeds are not identifiable as "whatever is received in respect of an assigned receivable" (see article 5 (j)), article 24, paragraph 1 (b), may not even come into play (unless the law applicable is familiar with the notion of proceeds and tracing of proceeds). The situation is different in article 26, which envisages clearly identifiable proceeds.

**Acceptability of article 24, paragraph 1 (b)**

6. The general question that the Commission may wish to address is whether priority issues relating to certain types of asset, the assignment of which has been excluded from the draft Convention, should be addressed if those types of asset are proceeds derived from receivables. The Commission may wish to consider addressing the question for each of those types of asset.

**Securities**

7. It would seem that there is sufficient momentum in favour of the place of the relevant intermediary approach ("PRIMA", which in essence refers to the location of the account) with respect to the law applicable to dispositions of securities. PRIMA is considered by the Hague Conference on Private International Law and by the Commission of the European Union. It is also already reflected in the law of some countries (e.g. article 29 of law no. 83-1 of 3 January 1983 in France, article 9, paragraph 2 of the European Union Directive on Settlement Finality and article 8-110 of the Uniform Commercial Code in the United States of America). Furthermore, it is currently under consideration in other countries (e.g. Australia, Canada, Japan, the Netherlands

and the United Kingdom). However, the exact formulation of PRIMA is a matter that still remains to be considered. In particular, it is not clear yet to what extent the account holder and the relevant intermediary will be allowed to specify in their custody agreement the location of the account without the need for an objective connecting factor. Furthermore, it is not absolutely clear what the terms "location", securities", "securities account" or "securities intermediary" mean exactly.[4]

8. This situation presents both a problem of substance and a problem of procedure for the Commission. The problem of substance relates to whether PRIMA should be adopted and, if so, in what form. The problem of procedure relates to whether the Commission could adopt PRIMA without co-ordinating with the work of the Hague Conference, since it is highly unlikely that a text will emerge from the Hague Conference by the time the Commission has to adopt the draft Convention. In addressing this matter, the Commission may wish to consider the possible alternatives.

9. One alternative would be for the draft Convention to include a free-standing PRIMA-based rule. The advantage of such a rule would be that it would provide sufficient certainty as to the law applicable under the draft Convention. The disadvantage of such an approach though would be that efforts to prepare such a rule would go far beyond this project and would risk producing a result that would be inconsistent with the text being prepared by the Hague Conference. Another alternative would be for the Commission to include a rule that would set the principle of PRIMA without going into any details for which reference would be made to other texts. The advantage of this approach would be that it would recognize PRIMA as a matter of principle. Its disadvantage though would be that it would not provide sufficient guidance. In addition, it could create problems of co-ordination, in particular if the rule of the draft Convention were to be read as a free-standing rule to be interpreted without reference to the text of the Hague Conference.

10. Yet another alternative would be to provide in the draft Convention that issues of priority would be governed by the law applicable under private international law rules applicable with respect to the relevant types of asset. The commentary could further elaborate on the PRIMA-based approach as the increasingly prevailing approach with respect to disposition of property rights in securities. The advantage of this approach would be that it would reflect a generally acceptable principle without prejudging what the law applicable might be. Its disadvantage, however, would be that such a provision would be unnecessary as stating the obvious, without providing any guidance as to the law applicable. Yet another alternative would be to address the matter only in the commentary. The commentary could refer to PRIMA as being the preferred approach to be reflected in the text of the Hague Conference. The advantage of this approach would be that, through the discussion of the matter in the commentary, the Commission would give as much guidance to States as can be given, without burdening the draft Convention with provisions that do not set clear rules. The Commission may, therefore, wish to delete article 24, paragraph 1 (b) (ii), and to address the matter in the commentary with a view to clarifying the advantages of PRIMA and to referring to the Hague Conference text.

**Deposit accounts**

11. With respect to article 24, paragraph 1 (b) (iii), the Commission may wish to consider following an approach similar to the approach to be followed with respect to securities. It would appear that there are strong arguments in favour of the law of the country in which the depository institution is located (see A/CN.9/486, para. 58). The reference to the law of the bank's location

[4] Both the draft that emerged from a meeting of the Hague Conference in January 2001 and the current proposal by the Commission of the European Union for a Directive allow parties to the custody agreement to specify the location of the account. However, there is one condition, namely that that there is an objective connecting factor (i.e. the place is specified is the place where the relevant intermediary has an office or branch and from which the intermediary reports to its account holders or for regulatory or accounting purposes). However, both drafts are in the form of working documents subject to further discussion.

could also be read as a reference to the location of the account (a PRIMA-like approach). However, a reference to the law of the bank's or the account's location would be inconsistent with the approach taken in jurisdictions that refer to the law of the assignor's location. Furthermore, an effort to define the location of the bank or the account may re-open the difficult questions the Commission had to address in defining "location" for the purposes of the draft Convention. The Commission may, therefore, wish to consider deleting article 24, paragraph 1 (b) (iii), and leaving the matter to the commentary, either with a clear recommendation as to the law applicable (if the Commission promptly reaches agreement on such a recommendation) or with an analysis of the alternatives (if the Commission does not reach such an agreement).

**Negotiable instruments**

12. The law applicable to priority in negotiable instruments may be less controversial than the law applicable to priority in securities or in deposit accounts. However, article 24, paragraph 1 (b) (i), raises an issue of overlap with article 24, paragraph 1 (b) (ii). Negotiable instruments may well include securities if they are evidenced by certificates transferable by delivery (with any necessary endorsement). In addition, priority with respect to securities held directly by their owner may need to be also referred to the law of their location (*lex rei sitae*), since it is the indirect holding pattern that justifies the replacement of the *lex rei sitae* by PRIMA. However, it is questionable whether a rule on priority in negotiable instruments only would be sufficiently useful without a rule on securities and deposit accounts. The Commission may, therefore, wish to consider deleting article 24, paragraph 1 (b) (i), and including the relevant analysis in the commentary with a view to providing guidance to States.

**Relationship between article 26 and the Hague Conference text**

13. In principle, it would appear that no conflict could arise between article 26 and the Hague Conference text, since article 26 is a substantive law provision, while the Hague Conference text is a private international law text. Under article 26, if the assignee has priority with respect to the receivable and the conditions of paragraphs 1 and 2 are met, the assignee has priority with respect to proceeds of the receivable as against a competing assignee of the receivable or of the proceeds (as original collateral), as against a creditor of the assignor (including a creditor with a right in proceeds as original collateral) and as against the administrator in the insolvency of the assignor. If the place of the relevant intermediary is a State party to both the draft Convention and the Hague Conference text (and the draft Convention applies because the assignor is located in a Contracting State), article 26 would be the law of the place of the relevant intermediary. There would be no conflict in this case between article 26 and PRIMA. If, however, the place of the relevant intermediary is not a State party to the draft Convention (and the draft Convention applies because the assignor is in a Contracting State), article 26 would be a law other than PRIMA (and, as a result, an intermediary may find that it does not have priority even though it did all it could in that regard under PRIMA).

14. It would, therefore, appear that different results would be reached depending on whether article 26 or PRIMA applies. However, even in this case the conflict is rather apparent than real. If the receivable is paid to the assignee (article 26, paragraph 1), there are no proceeds in which an intermediary may have a right as creditor of the assignor. If the receivable is paid to the assignor (article 26, paragraph 2) and is held in a segregated account, an intermediary would normally have no right in such an account since securities covered by netting agreements are not in such a segregated account. To enhance certainty with regard to an intermediary, the need for notice to an intermediary (or any depository institution) about the nature of the account may need to be further clarified in article 26, paragraph 2. A new subparagraph (a*bis*) could read along the following lines: "notice to that effect is given to a person holding a right created by agreement which not derived from the receivable or a person with a right of set-off". The commentary could explain that the right meant may be a security right or the right of a purchaser of the relevant property. In current subparagraph (b), after the word "deposit" the words "or securities" would need to be added to cover both deposit and securities accounts. The commentary could also explain that article 26 is not intended to and does not create any conflict with PRIMA.

15. Alternatively, the Commission may wish to ensure that the rights of a depository institution or a securities intermediary or an assignee of the bank or securities account as original collateral would not be affected by article 26, paragraph 2. Language along the following lines may be considered: "Nothing in paragraph 2 of this article affects the priority of a right, not derived from the receivable, of a person holding a right created by agreement or of a person holding a right of set-off".

16. With such an approach, while article 26, paragraph 2, would apply in general, its real impact would be limited to conflicts between an assignee of the receivable claiming the account as proceeds and creditors of the assignor or the insolvency administrator. This result would be justified by the fact that such persons would normally not be extending credit to the assignor in reliance on the relevant bank or securities account. Article 27 would also apply to validate a subordination agreement between a depository institution or a securities intermediary and an assignee.

## 2. Existence and characteristics of the right of a competing claimant in proceeds (article 24, para. 1 (c))

17. The above-mentioned analysis with respect to article 24, paragraph 1 (b) would apply also to article 24, paragraph 1 (c). In attempting to provide certainty as to the law applicable to the existence and the characteristics of the rights of a competing claimant, this provision adds an additional level of complexity to the draft Convention. In addition, it deals with issues that may go well beyond the scope of the draft Convention. Moreover, this provision may be inappropriate to the extent that matters, such as the existence of a right, may be subject to the law of the location of the relevant asset (*lex rei sitae*) or to the law governing insolvency (*lex concursus*). The Commission may, therefore, wish to delete article 24, paragraph 1 (c).

## 3. Characteristics of a right (article 24, para. 2)

18. The characteristics of a right are treated in article 24, paragraph 2 as issues distinct from priority. This approach runs counter to the policy of the Working Group to address that matter only in the context of a priority conflict. It also complicates article 24 unnecessarily. Ensuring that article 24, which is one of the most important provisions of the draft Convention, sets a clear and simple rule may well facilitate its proper understanding and application. The Commission may, therefore, wish to combine the definitions of characteristics and priority, moving article 24, paragraph 2 to article 5, subparagraph (g). Such an approach may also clarify the meaning of the term priority. It could also assist in addressing form requirements for the assignment to be effective as against third parties (this approach is taken in article 5 of the Hague Conference text, of 19 January 2001; article 8 may not be appropriate in addressing form requirements for priority purposes; see paras. 33 and 34). Language along the following lines could be considered for a revised article 5, subparagraph (g): "Priority means the right of a person in preference to the right of a competing claimant and includes the determination whether the right is a property right or not, whether it is a security right for indebtedness or other obligation or not and any steps necessary to render a right effective against a competing claimant".

19. If the Commission decides to follow such an approach, article 24 would read as follows:

"With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26, the law of the State in which the assignor is located governs:

"(a) The priority of the right of an assignee in the assigned receivable with respect to the right of a competing claimant; and

"(b) The priority of the right of the assignee in proceeds that are receivables whose

assignment is governed by this Convention with respect to the right of a competing claimant." (see, however, para. 42).

## 4. Relationship between the assignee and the debtor (article 20)

20. The Working Group referred to the Commission the question whether the essence of article 30 should be included in article 20. The matter was briefly discussed by the Working Group further to a suggestion aimed at ensuring that the benefits of article 30 would not be lost if a State opted out of chapter V (see A/CN.9/486, para. 83). If that suggestion is acceptable to the Commission, language along the following lines may be considered for article 39: "A State may declare at any time that it will not be bound by chapter V with the exception of articles 30, 32 and 33". Thus, article 30 would continue to apply and its substance would continue to be subject to the principles of mandatory law and public policy (and these principles would continue to be inapplicable to provisions other than those in chapter V). If the Commission prefers to retain the possibility for an opt-out of chapter V as a whole (see A/CN.9/486, para. 111), language along the following lines could be considered: "A State may declare at any time that it will not be bound by chapter V as a whole or by articles 28, 29 and 31 only". Such an approach could increase the flexibility of the draft Convention but could also reduce its unifying effect to the extent that chapter V may apply to differing degrees from State to State.

## 5. Form (new provision in chapter V)

21. The Working Group referred to the Commission the question whether a provision dealing with the law applicable to the form of the assignment and the contract of assignment should be included in chapter V (see A/CN.9/486, paras. 76 and 174). Such a new provision would provide certainty as to the law applicable to form in cases where article 8 does not apply because the assignor is not located in a Contracting State. If the form of the assignment as against third parties is left to the law of the assignor's location (see paras. 18, 33 and 34) and the form of the assignment as between the assignor and the assignee and as against the debtor is addressed by way of a substantive law rule (see para. 34), all that would remain to be addressed in chapter V would be the law applicable to the form of the contract of assignment. That matter may be left to generally applicable private international law rules on the form of contracts. Alternatively, language along the lines of article 11 of the Convention on the Law Applicable for the International Sale of Goods could be considered:

"1. A contract of assignment concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it or of the State in which it was concluded.

"2. A contract of assignment concluded between persons who are in different States is formally valid if it satisfies the requirements either of the law which governs it or of the law of one of those States."

## 6. Applicable law in territorial units (article 37)

22. The Commission may wish to consider article 37, which appears within square brackets, in the light a proposal to be submitted by certain federal States (A/CN.9/486, para. 97).

## 7. Reservations and declarations (article 44)

23. At the last session of the Working Group, the view was expressed that equating reservations with declarations might inadvertently result in the application of reservation-related provisions of treaty law, including provisions on reciprocity. This view was based on the assumption that the draft Convention did not authorise any reservations. On that basis, the suggestion was made that

the wording "except those expressly authorised in this Convention" should be deleted or article 44 should be recast to refer to declarations (see A/CN.9/486, paras. 125 and 126).

24. To the extent that articles 36, paragraph 1, 39-41 and 42, paragraph 5, exclude or modify the effect of certain provisions of the draft Convention, they reflect, in principle, reservations. Guideline 1.1.8 "Reservations made under exclusionary clauses" adopted by the International Law Commission during its last session is clear in this respect.[5] In addition, article 17, paragraph 1 of the 1969 and 1978 Vienna Conventions on the Law of Treaties creates a clear link between a provision allowing a State to opt out of a part of a convention and a reservation. If such declarations are made, not at the time of signature or expression by a State of its consent to be bound, they may be viewed either as reservations allowed to be made at any time or as partial denunciations.

25. The Commission may, therefore, wish to retain article 44, which is a standard provision in conventions emanating from the work of the Commission, unchanged. The commentary on article 44 could clarify that articles 36, paragraph 1, 39-41 and 42, paragraph 5, provide for reservations, at least if made at the time of signature or expression by a State of its consent to be bound, while article 37 provides for an interpretative declaration and article 42 has the character of an optional clause. Alternatively, article 44 could be revised along the following lines: "No reservations are permitted except those authorized in articles 36, paragraph 1, 39 to 41 and 42, paragraph 5" [to the extent they are made at the time of signature, ratification, approval or accession]. In order to avoid the technical question addressed in the bracketed language, the Commission may wish to consider formulating article 44 along the following lines: "No reservations are permitted". The commentary could explain that this formulation is intended to avoid this technical question and that it is not intended to change the legal nature of reservations made possible by other provisions.

### 8. Annex

26. The Commission may wish to consider including in the annex a provision on the designation of the supervising authority, the registrar and the preparation of regulations (see A/CN.9/486, para 153 and 174). Language along the following lines may be considered: "At the request of not less than one third of the [Contracting] [Signatory] States to this Convention, the depositary shall convene a conference of the [Contracting] [Signatory] States for designating the supervising authority and the first registrar, and for preparing the first regulations and for revising or amending them". The Commission may also wish to discuss articles 6 to 9 in the light of a proposal to be submitted to the Commission by States (see A/CN.9/486, paras. 163, 165 and 168).

## B. Articles 1 to 17: issues left pending by the Commission or referred by the Working Group to the Commission

### 1. Exclusions of transfers of negotiable instruments (article 4, para. 1 (b))

27. The Working Group referred to the Commission the question whether transfers of negotiable instruments by delivery without a necessary endorsement or by a book entry into a depository's accounts should be excluded (see A/CN.9/486, paras. 62 and 63). A related question that was also referred to the Commission was whether, if transfers by delivery without a necessary endorsement are not excluded, conflicts of priority relating to such transfers should be referred to the law of the location of the relevant negotiable instrument.

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[5] Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), para. 663.

28. The Commission may wish to recall the policy of article 4, paragraph 1 (b) to preserve the rights and obligations of parties under negotiable instrument law, without excluding the assignment of the underlying contractual receivable (see A/55/17, para. 29; and A/CN.9/470, paras. 43 and 44). It would be consistent with that policy to also exclude transfers by delivery without a necessary endorsement or by a book entry if they are regulated in negotiable instrument law. This result could be achieved through language along the following lines: "This Convention does not affect the rights and obligations of any person under negotiable instrument law". This wording would also make it unnecessary to refer to the way an instrument is transferred. It would also result in avoiding excluding the assignment of a contractual receivable just because the receivable is incorporated into a negotiable instrument. Furthermore, it would result in excluding rights of persons under negotiable instrument law, irrespective of whether they are parties to the instrument or not (e.g. attaching creditors).

### 2. Exclusions by declaration (article 4, para. 4)

29. At the last session of the Working Group, both strong support and opposition was expressed with respect to the possibility for an exclusion of further, existing or future, practices by declaration by States. Particular emphasis was placed on the value of article 4, paragraph 4, in providing flexibility to deal with future practices that cannot be anticipated at the present stage. Existing practices mentioned for such treatment involve receivables from foreign exchange transactions, to the extent they are not already excluded in article 4, paragraph 2 (a) and (b), or receivables from consumer transactions, unless a general consumer-protection provision is included in the draft Convention (see A/CN.9/486, paras. 116 and 117; as to consumer protection, see paras. 38 to 40 below). The Commission may wish to consider excluding those practices directly instead of leaving them to States to exclude by declaration. Such an approach would ensure a higher degree of certainty and uniformity as to the scope of the draft Convention. If such an approach is followed, the potential impact of article 4, paragraph 4 would be limited to future practices. As a result, it may be easier for the Commission to decide whether to retain or delete this provision. If the Commission decides to retain article 4, paragraph 4, it may wish to consider whether it would be consistent with the policy underlying that provision to also allow States to apply the draft Convention to practices to which it is not intended to apply ("opt-in" by declaration by States).

### 3. Exclusions of transfers of intangible property (articles 11, para. 3 (a) and 12, para. 4 (a))

30. The term "goods" was placed within square brackets, since the reference in the French text to "biens meubles corporels" raised the question whether it includes general intangible property (i.e. intellectual or industrial property or other information; see A/55/17, para. 185). It would seem that intangibles are covered in articles 11, paragraph 3 (b) and 12, paragraph 4 (b). Therefore, the Commission may wish to remove the square brackets around the term "goods" and have the matter clarified in the commentary.

## C. Additional issues

31. Depending on the availability of time, the Commission may wish to also consider the following issues.

## 1. Exclusions of real estate receivables (article 4, para. 3)

32. The Commission may wish to consider whether article 4, paragraph 3 (a) could be replaced by language along the following lines to be added at the end of the proposed new provision with respect to negotiable instruments (see para. 28): "or under real estate law". In such a case, article 4, paragraph 3 (b) could be replaced by language along the following lines to be inserted at the end of article 9, paragraph 3: "including limitations governing the acquisition of property rights in real estate under the law of the State in which the real estate is located".

## 2. Effectiveness (articles 8 to 12)

### Article 8

33. In providing that meeting the form requirements of the assignor's location is sufficient, article 8 provides guidance to assignees as to how to ensure that an assignment will be formally valid. However, if the law of the assignor's location requires, for example, notification for an assignment to be formally (not materially)[6] valid, article 8 is not helpful. In such a case, article 8 would fail, for example, to remove obstacles with respect to the assignment of future receivables in which notification of the debtor is not possible, at least, until the receivable arises and the debtor's identity becomes known. In addition, to the extent that article 8 refers to laws other than the law of the assignor's location, it may be inconsistent with article 24 to the extent that form requirements may be characterised as matters relating to priority.

34. The Commission may, therefore, wish to explore the possibility of including a substantive law rule on form as between the assignor and the assignee, and as against the debtor. A possible approach may be based on the understanding that no form is necessary as between the assignor and the assignee and as against the debtor. As to the assignor and the assignee, party autonomy should prevail. As against the debtor, no form is necessary, since the debtor is sufficiently protected by the requirement for a written notification. Language along the following lines may be considered: "As between the assignor and the assignee and as against the debtor, the assignment need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Under such an approach, article 8 would address formal validity and article 9 material validity. Obstacles created to the assignment of future receivables would be removed in a consistent and sufficiently comprehensive way. To the extent they are necessary for priority purposes, form requirements could be left to the law of the assignor's location (see para. 18).

### Article 9

35. In referring to future receivables in general and despite article 9, paragraph 3, article 9, paragraph 1 may inadvertently result in validating an assignment of any future receivables, including consumer receivables or pensions and wages, even though such an assignment is prohibited by law. Therefore, the Commission may wish to reformulate article 9, paragraph 1 along the following lines: "An assignment of one or more existing or future receivables and parts of or undivided interest in receivables is not ineffective as between the assignor and the assignee or as against the debtor and a competing claimant on the sole ground that it relates to future receivables if, at the time of the conclusion of the original contract, they can be identified as receivables to which the assignment relates."[7] The reference to the effectiveness of an assignment between an assignee and a competing claimant is intended to cover the matter addressed in article 9, paragraph 4, which may be no longer necessary.

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[6] If notification is a condition of material validity, article 9 would be sufficient to remove such obstacles.

[7] Article 5 of the Unidroit Convention on International Factoring is formulated along the same lines (" a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually ...").

**Article 10**

36. The Commission may wish to reconsider whether article 10 should be retained. It would seem that the time of the assignment is important for determining priority and for determining whether an assignment could be set aside as a fraudulent or preferential transfer if made within a certain time period before the commencement of an insolvency proceeding ("the suspect period"). However, the opening words of article 10 take away that effect from article 10 and thus render it meaningless. The term "time of assignment" is used only in draft article 9, paragraph 1 (b), but reference could be made there, as in other provisions (e.g. articles 1, paragraph 1 (a), 3, 4, subparagraph (b), 14, 38, 41 and 6 of the annex), directly to the time of the conclusion of the contract of assignment. As to the issue whether parties to are allowed to set the time of assignment without affecting the rights of third parties, article 10 is still not necessary, since this result is implicit in article 6. The Commission may, therefore, wish to consider deleting article 10.

**Articles 11 and 12**

37. The policy underlying articles 11, paragraph 3, and 12, paragraph 4, is to *limit* the application of articles 11 and 12 to assignments of *trade receivables* (see A/55/17, paras. 104-108). However, "trade receivable" is defined so broadly that the only import of article 11, paragraph 3 is to exclude from the scope of article 11 the assignment of financial service receivables. The Commission may wish to express that result directly along the following lines: "Article 11 does not apply to assignments of receivables arising from financial service contracts". In order to avoid creating uncertainty, the Commission may also wish to define financial service contracts. However, it would appear that the exclusions of financial service practices in article 4 would be broad enough to, at least, cast some doubt about the value of article 11, paragraph 3. Perhaps, the only practices that are not excluded in article 4 and may need to be excluded in article 11 are those that relate to assignments of loans or of insurance receivables. It would be better to exclude the assignment of those types of receivables directly rather than by way of a vague reference to financial service contracts. Language along the following lines may be considered to replace the current wording of article 11, paragraph 3: "Article 11 does not apply to assignments of receivables arising from loan agreements or insurance policies [...]". Alternatively, if general language is preferred language along the following lines could be considered: "Article 11 does not apply to the assignment of a single, existing receivable" (although this formulation may result in excluding additional practices, such as an assignment of a high-value receivable from an aircraft, real estate or construction contract).

## 3. Consumer protection issues

38. At its thirty-third session, the Commission decided not to include any language specific to consumer debtors in article 17 on the understanding that it may have to reconsider the matter. A suggestion to include a provision clarifying that the draft Convention would not permit a consumer debtor to vary or derogate from the original contract if that was not permitted under consumer-protection legislation was met with interest but was not adopted (see A/55/17, paras. 170-172).

39. At the last session of the Working Group, the view was expressed that, unless some reference to consumer-protection legislation were included in article 17, certain States might have to exclude practices relating to consumer receivables (see A/CN.9/486, para. 116). In order to avoid such a result, which could inadvertently reduce the value of the draft Convention, the Commission may wish to reconsider the matter. Reconsideration of the matter would not require a policy change. Reflecting the policy of the Commission, the commentary specifically provides that the draft Convention is not intended to override consumer-protection legislation (see A/CN.9/470, para. 128 and A/55/17, para. 170).

40. With respect to the protection of consumers that are assignors, article 9, paragraph 3, may be sufficient in that it provides that the draft Convention does not affect statutory prohibitions. However, article 9, paragraph 3, may not be sufficient to the extent that article 9, paragraph 1, may be read as validating the assignment of future receivables even in the case of consumer receivables. Although the suggested reformulation of article 9, paragraph 1, may address the matter (see para. 35), it may be better to include in the draft Convention language covering consumer assignors as well. The focus may be on an element highlighted during the discussion by the Commission last year, namely on mandatory law provisions that cannot be varied or derogated from by agreement of the parties. With such an approach, it may be possible for the Commission to address the concern expressed, thereby reducing significantly the possibility for a reservation as to the application of the draft Convention to assignments of consumer receivables. At the same time, such an approach would not undermine the certainty sought by the draft Convention or change the policy approved by the Commission. Language along the following lines may be considered for article 4: "This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes." The commentary could explain that, with the exception of assignments excluded in article 4, paragraph 1 (a), the draft Convention applies to assignments of consumer receivables but is not intended to interfere with domestic internal mandatory consumer-protection legislation. If the Commission adopts the proposed text, the specific reference to consumer protection in articles 21, paragraph 1, and 23 would not be necessary.

### 4. Debtor's defences and rights of set-off (article 20, para. 1)

41. In some jurisdictions, if the assignment is effective, the debtor may lose any right of set-off. As article 20 does not grant to the debtor a right of set-off if, under law applicable outside the draft Convention, the debtor does not have such a right, the debtor may not have any right of set-off in such jurisdictions. In order to avoid that result, the words "as if the assignment had never been made" could be inserted at the end of article 20, paragraph 1.

### 5. Priority issues (article 24, para. 1 (a) (ii))

42. Article 24, paragraph 1 (a) (ii) envisages situations in which the debtor pays by assigning a receivable. In such situations, there would be two assignors (the assignor of the original receivable and the debtor/assignor of the receivable assigned in payment of the original receivable). The Commission may wish to consider the question of whose law should govern. The Commission may also wish to consider moving this provision to article 26 so as to concentrate all proceeds-related rules in one article.

## D. Procedure for the final adoption of the draft Convention

43. At its forthcoming session, the Commission would need to consider the procedure for the final adoption the draft Convention (see A/55/17, paras. 189 and 192). In determining whether to recommend final adoption of the draft Convention by the General Assembly or by a diplomatic conference to be convened by the General Assembly, the Commission may wish to take into account considerations that influenced the decision of the Commission on this matter in the past. Six conventions have been prepared on the basis of texts elaborated by the Commission. Four were adopted at a diplomatic conference and two were adopted by the General Assembly.

44. Considerations taken into account by the Commission in recommending adoption of a convention by a diplomatic conference include the following: technical texts should be adopted in special meetings of bodies of qualified experts; cost savings from referring a draft Convention to a working group of the Sixth Committee and the General Assembly may be apparent rather than

real (see A/8717, para. 19 and A/CN.9/SR.123; UNCITRAL Yearbook, vol. III:1972); financial implications and invitation by a State (see A/31/17, paras. 39-43; UNCITRAL Yearbook, vol. VII:1976); dispensing with the need for a conference would deprive many States, in particular developing States and States not represented in the Commission, of the opportunity to scrutinise the text and to influence the final content and form of the text; the Commission should conclude in the appropriate way work in which efforts and expenses of a long period of time had been invested (see A/32/17, paras. 20-32; UNCITRAL Yearbook vol. VIII:1977); even a sound legal text could be further improved; and a conference would be the most desirable forum of negotiations between States, specialists and industry (see A/44/17, paras. 223 and 224; UNCITRAL Yearbook, vol. XVI:1985).

45. Considerations on the basis of which the Commission decided to refer a convention to the General Assembly include the following: the expense of a diplomatic conference may not be justified in the case of a text which is the culmination of work of a number of years, has been extensively discussed and has been refined sufficiently to not need any further substantive consideration (see A/42/17, para. 301 and A/50/17, para. 199; UNCITRAL Yearbook, vol. XVIII:1987 and vol. XXV:1995 respectively).

46. In view of the above considerations, the Commission may wish to recommend adoption of the draft Convention by the General Assembly if it is satisfied that the text has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States. In its deliberations, the Commission may wish to also take into account the possibility that a diplomatic conference may change the text of the draft Convention adopted by the Commission, but also the potential for a wider participation by States in a diplomatic conference and the potential impact of a diplomatic conference on the acceptability of the draft Convention.

## E. Drafting matters

47. If agreement can be reached in a timely manner, the Commission may wish to refer the following matters to the drafting group.

48. Articles 2 (assignment) and 3 (internationality) are in chapter I (scope of application), while article 5 (definitions and rules of interpretation) is in chapter II (general provisions), since articles 5 does not deal mainly or only with scope-related provisions. However, article 5 contains important scope-related provisions that may need to be highlighted right at the beginning of the draft Convention (e.g. the definition of "location"). It may, therefore, be more logical and useful for the reader to have all the definitions and interpretations in one provision which could be article 2 (the present articles 2 and 3 could be subparagraphs (a) and (b) of that new article 2). Chapters I and II would be merged in one chapter entitled scope of application and general provisions.

49. The word "made" at the beginning of subparagraphs (a), (b) and (c) of article 4, paragraph 1 should be deleted, since it appears in the chapeau of article 4, paragraph 1. Reference should be made throughout the draft Convention to securities in general, rather than to investment securities.

50. In order to make it absolutely clear that representations take effect at the time when the assignment takes effect, the Commission may wish to revise article 14, paragraph 1 along the following lines: "Unless ... the assignor represents [...] that *at the time of the conclusion of the contract of assignment*: ..." (the position of the words in italics is simply changed). In addition, in order to ensure that the assignor will be held responsible if the receivable has not been validly created, words along the following lines may be inserted at the beginning of paragraph 1 (c): " the receivable exists and ...".

51. Usages and practices may bind the assignor and the assignee but not third parties (see article 13, paragraph 2 and A/CN.9/489, para. 107). Representations (that may stem even from trade and usages) are considered as being given not only to the initial but also to any subsequent assignee

(see article 14, paragraph 1 and A/CN.9/489, para. 111). The Commission may wish to confirm that the commentary appropriately reflects its understanding.

52. For consistency with article 1, paragraph 3, the reference to the law governing the receivable in article 41, paragraph 2 (b) should be substituted by a reference to the law governing the original contract.

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## Receivables Financing

# Draft Convention on Assignment of Receivables in International Trade: comments on pending and other issues

**Note by the Secretariat**

This note reproduces in the annex the cost estimate for a diplomatic conference in Vienna (see A/CN.9/491, paras. 43-46) prepared by Finance and Budget Section.

V01-84657

**Annex**

**Cost Estimate to hold**
**Diplomatic Conference on Assignment of Receivables**
**in Vienna, Fall 2002**

| No. | Cost Item | Conference servicing cost in Vienna | | | |
|---|---|---|---|---|---|
| **I.** | **Translation Service:** | # of pages | | | |
| | Pre-session translation | 1,000 | | $ | 178,000 |
| | In-session translation | 1,000 | | $ | 178,000 |
| | Post-session translation | 250 | | $ | 44,500 |
| | Summary records translation | 3,030 | | $ | 539,340 |
| | In-house summary records | | | $ | 155,700 |
| | Overtime, night differential, taxi etc. | | | $ | 10,500 |
| | **sub-total: Translation service** | | | **$** | **1,106,040** |
| **II.** | **Interpretation Service:** | | | | |
| | **interpreters** | # of staff | # of days | DSA days | |
| | Staff interpreters | - | - | | - |
| | Free lance interpreters (non-local) | 20 | 20 | | 400 |
| | Free lance interpreters (non-local) | 20 | 6 | | 120 |
| | | **40** | | | **520** |
| | DSA | | | $ | 83,720 |
| | Terminal expense | | | $ | 4,320 |
| | Airfare | | | $ | 52,000 |
| | Interpreters salary | | | $ | 183,300 |
| | **Interpretation support** | | | | |
| | DSA | | | | |
| | Terminal expense | | | | |
| | Airfare | | | | |
| | **sub-total: Interpretation service** | | | **$** | **323,340** |
| **III.** | **Reproduction Service:** | | | | |
| | Page impressions(2,346,510) | | | $ | 58,013 |
| | **sub-total: Reproduction service** | | | **$** | **58,013** |
| **IV.** | **Substantive Secretariat Service:** | | | | |
| | From Vienna | | | | |
| | From New York | 2 | 21 | | 42 |
| | DSA | | | $ | 6,762 |
| | Terminal expense | | | $ | 216 |
| | Airfare | 1,800 | | $ | 3,600 |
| | **sub-total: Substantive secretariat service** | | | **$** | **10,578** |

**Cost Estimate to hold**
**Diplomatic Conference on Assignment of Receivables**
**in Vienna, Fall 2002**

| No. | Cost Item | Conference servicing cost in Vienna |
|---|---|---|

**V. Conference Service & Logistical Support:**

| | # of days | Salary($) | | |
|---|---|---|---|---|
| **Plenary:** | | | | |
| Technician | 19 | 1,255 | | |
| Conference Officer | 44 | 2,519 | | |
| Usher | 66 | 3,264 | | |
| Messenger | 44 | 2,176 | | |
| Messenger for the Secretariat | 22 | 1,088 | | |
| Micro swicher | 19 | 1,088 | | |
| Delegates aide | 19 | 1,088 | | |
| Wardrobe aide | 19 | 940 | | |
| Registration clerk | 3 | 172 | | |
| Documents Control clerk | 19 | 1,088 | | |
| Documents Distribution clerk | 44 | 2,519 | | |
| Bilingual secretary | 44 | 3,364 | | |
| Interpretatio messenger | 19 | 1,088 | | |
| Telephone operator | 38 | 2,176 | | |
| Overtime | | 6,000 | $ 29,825 | |
| **Drafting Group:** | | | | |
| Technician | 5 | 330 | | |
| Conference Officer | 10 | 573 | | |
| Usher | 10 | 495 | | |
| Messenger | 10 | 495 | | |
| Micro switcher | 5 | 286 | $ 2,179 | |
| **sub-total: Conference & logistical support** | | | | **$ 32,004** |

**VI. UN Security and Safety Services:**

| | | | | |
|---|---|---|---|---|
| Overtime - Security Staff | | | | **$ 28,204** |

**VII. Transportation of Supplies & Material:** -

**VIII. Communications Charge:**

| | | | | |
|---|---|---|---|---|
| 1 IT Staff | 19 | 1,255 | | **$ 1,255** |

| | |
|---|---|
| **TOTALS** | **$ 1,559,434** |

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**United Nations Commission on International Trade Law**
Thirty-fourth session
Vienna, 25 June – 13 July 2001

# Draft Model Law on Electronic Signatures

# Compilation of Comments by Governments and International Organizations

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## Introduction

1. The Commission, at its thirtieth session, in 1997, endorsed the conclusions reached by the Working Group on Electronic Commerce at its thirty-first session with respect to the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities and possibly on related matters (A/CN.9/437, paras. 156 and 157). The Commission entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.[1] The Working Group began the preparation of uniform rules for electronic signatures at its thirty-second session (January 1998) on the basis of a note prepared by the Secretariat (A/CN.9/WG.IV/WP.73). At its thirty-first session, in 1998, the Commission had before it the report of the Working Group (A/CN.9/446). The Commission noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that had arisen from the increased use of digital and other electronic signatures. However, it was generally felt that the progress achieved so far indicated that the draft uniform rules on electronic signatures were progressively being shaped into a workable structure. The Commission reaffirmed the decision it had taken at its thirtieth session as to the feasibility of preparing such uniform rules and noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.[2]

2. The Working Group continued its work at its thirty-third (July 1998) and thirty-fourth (February 1999) sessions on the basis of notes prepared by the Secretariat (A/CN.9/WG.IV/WP.76, 79 and 80). At its thirty-second session, in 1999, the Commission had before it the reports of the Working Group on the work of those two sessions (A/CN.9/454 and A/CN.9/457, respectively). While the Commission generally agreed that significant progress had been made in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in building a consensus as to the legislative policy on which the uniform rules should be based. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions. While it did not set a specific time-frame for the Working Group to fulfil its mandate, the Commission urged the Group to proceed expeditiously with the completion of the draft uniform rules. An appeal was made to all delegations to renew their commitment to active participation in the building of a consensus with respect to the scope and content of the draft uniform rules.[3]

3. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the Secretariat (A/CN.9/WG.IV/WP. 82 and 84). At its thirty-third session (2000), the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and 467, respectively). It was noted that the Working Group, at its thirty-sixth session, had adopted the text of articles 1 and 3 to 12 of the uniform rules. Some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the draft uniform rules. A concern was expressed that, depending on the decisions to be made by the

Working Group with respect to articles 2 and 13, the remainder of the draft provisions might need to be re-examined to avoid creating a situation where the standard set by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

4. After discussion, the Commission expressed its appreciation for the efforts made by the Working Group and the progress achieved in the preparation of the draft uniform rules on electronic signatures. The Working Group was urged to complete its work with respect to the draft uniform rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the Secretariat.[4]

5. At its thirty-seventh session (September 2000), the Working Group discussed the issues of electronic signatures on the basis of the note prepared by the Secretariat (A/CN.9/WG.IV/WP.84) and the draft articles adopted by the Working Group at its thirty-sixth session (A/CN.9/467, annex).

6. After discussing draft articles 2 and 12 (numbered 13 in document A/CN.9/WG.IV/WP.84), and considering consequential changes in other draft articles, the Working Group adopted the substance of the draft articles in the form of the draft United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures. The text of the draft Model Law is annexed to the report of the thirty-seventh session of the Working Group (A/CN.9/483).

7. The Working Group discussed the draft guide to enactment of the draft Model Law on the basis of the notes prepared by the Secretariat (A/CN.9/WG.IV/WP.86 and WP.86/Add.1). The Secretariat was requested to prepare a revised version of the draft guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the thirty-seventh session. Due to lack of time, the Working Group did not complete its deliberations regarding the draft guide to enactment. It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the draft UNCITRAL Model Law on Electronic Signatures, together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.[5]

8. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law as approved by the Working Group was circulated to all governments and to interested international organizations for comment. The comments received as of 15 May 2001 from three governments and one non-governmental organization are reproduced below in the form in which they were communicated to the Secretariat.

# Compilation of comments

## A. States

## Colombia

**[Original: Spanish]**

### 1. General context

The Government of Colombia has been closely following the work being done in UNCITRAL; not only has it participated in this work, but it has incorporated its proposals in Colombian domestic legislation. Law 527 of 1999 is a clear example of this in that it incorporates the 1996 UNCITRAL Model Law on Electronic Commerce, with a few modifications reflecting Colombia's desire to give greater legal security to transactions using data messages.

Given the importance of the text adopted by UNCITRAL, the principles of the Model Law were included in Law 527 of 1999. However, in spite of the advances brought about in this way, the Colombian Drafting Commission also introduced a section on the conditions to govern the operations of certifying authorities,[1] as well as on the functions of the national agency responsible for authorizing their operations and performing functions of control, inspection and monitoring in order to protect users and consumers in the new market served by the companies concerned.

In order to ensure greater legal security for the users of electronic commerce, an obligation was created for corporate bodies wishing to provide certification services to register[2] with a State organ.[3] This provision was implemented by Decree 1747 of the year 2000, through which the Government laid down the conditions for the exercise of certifying activities, and the regulating process was completed with the issuance in the same year of Resolution 26930 of the Supervisory Authority for Industry and Commerce.

In addition, to make it possible to keep abreast, at the national level, with the work of UNCITRAL and in particular of the Working Group on Electronic Commerce, an ad hoc inter-agency committee has been set up to study the implications for Colombia of the draft Model Law on Electronic Signatures drawn up by the Working Group.

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1 Referred to as certifying entities in the Colombian text.

2 Law 527 of 1999 refers in this regard to "authorization for the exercise of their activities".

3 Supervisory Authority for Industry and Commerce.

## 2. Comments on the draft Model Law on Electronic Signatures

Recognition must be given to the excellent work done by the Working Group, and the merits of the document submitted to delegations, which reflects careful, dedicated work taking into account the complexity of the subject, deserve to be stressed.

However, the concrete objective of the draft text and its relationship with the earlier work done by the Working Group in adopting the Model Law on Electronic Commerce is not clear from the text.

The 1996 Model Law is a general proposal regarding the legal treatment of data messages and the legal security that is needed for commercial relations using such messages. It enshrines the fundamental principles that States may follow in adopting regulations on electronic commerce, thus contributing to the desired legal harmonization.

Although it is clear that the draft under consideration[4] deals with a specific subject, important for the identification and authentication of users, it must be remembered that the draft belongs in a broader context and is difficult to separate from that context. This is why the first problem for the Colombian Government relates to the objective of the Model Law and its consistency with earlier work on electronic commerce within UNCITRAL.

It is not sufficiently clear what the purpose of the draft is and what its relationship is with the Model Law on Electronic Commerce. It is evident for Colombia that there must be enough consistency in the work of UNICTRAL for a clear message to be given to States that are in the process of incorporating the Commission's proposals in their legislation, so that they can understand the background of each proposal and ensure that their legal provisions are not contradictory but rather complementary, and so that they can see that the two texts are aimed at common objectives, such as the harmonization and unification of law in this area, the creation of legal security and the lessening of uncertainty in electronic commercial relations.

In this regard, it is to be noted that the present draft does not take into account the general guidelines given in the Model Law on Electronic Commerce, such as those relating to functional equivalents, to which it does not make specific reference. In some cases it follows the guidelines expressly, as with the sphere of application, interpretation, variation by agreement and the definition of a "data message", to give some examples.

Functional equivalents are basic to the application of the model laws, since they are inherent in the legal security offered by technological tools, tools that also make it possible to establish a firm link between a document and the signature confirming it.

[4] Draft Model Law on Electronic Signatures.

The draft indicates that it applies where *electronic signatures* are used in the context of commercial activities, whereas the Model Law on Electronic Commerce refers to *data messages* related to commercial activities. In the case of Colombia, Law 527 of 1999 provides for a wider definition because it applies to all information in the form of *data messages*, without limiting them to data messages used in the context of commercial activities.

Colombia shares the view that the reference to commercial activities and the use of the word "commercial" to define the scope of the draft are sufficiently broad to avoid limitations, and it is proposed to leave the text as it has been approved, bearing in mind that States can enlarge its scope.

The draft would apparently complement the 1996 Model Law on Electronic Commerce, in view of the fact that there are no definitions, for example, of "writing" or "original", which are basic concepts for the interchange of data messages in digital form, in application of the principle of functional equivalence, together with the other principles set out in chapter III on the communication of data messages.

However, this situation is not clear from the draft, because it cannot be inferred from a reading of the draft whether the two instruments are complementary or totally independent, so that States could opt for one or the other, which would lead to ambiguities from the point of view of States whose legislatures have adopted the 1996 Model Law on Electronic Commerce as a frame of reference. A recommendation should be included for these countries, as well as a more specific recommendation, concerning the two texts, for countries that have not yet adopted them or are in the process of doing so.

This point should be clarified in the legal guide to enactment of the draft Model Law, and the recommendation should be included in the resolution of the Commission approving the Model Law on Electronic Signatures and the guide to enactment, making it clear that the Model Law on Electronic Signatures and the Model Law on Electronic Commerce should be adopted together or in a complementary manner.

In addition, the draft does not include a definition of an "electronic signature considered reliable" or an "electronic signature with legal effects" as determined by a provider of certification services, to be distinguished from the definition of an "electronic signature"; that would help to remove ambiguities.

The signature should be linked to a document and express the agreement of the signatory to the content of the document; in this light, article 6 on compliance with a requirement for a signature is not very clear, and its drafting could be improved, especially with regard to legal effects.

Article 6 establishes that the requirement for a signature is met in relation to a data message if a method of electronic signature is used which is as reliable as appropriate for the purposes concerned. This would permit the parties to establish an agreement on the matter.

It also indicates that an electronic signature is considered to be reliable when the signature creation data are linked to the signatory and to no other person, when they are under the signatory's exclusive control, when any alteration to the signature made after the time of signing is detectable[5] and, additionally, when a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the relevant information and any alteration made to that information is detectable.

It is therefore to be understood that an electronic signature that is considered reliable is the functional equivalent of a handwritten signature.

It must be added that, although reference is made to the question of an alteration made after the time of signing, this is not linked to a specific date, something that would make it possible to detect an alteration with greater certainty and, in turn, determine the legal effects of such alteration. The subject needs to be considered in greater detail.

The draft also foresees that there will be a person, organ or authority, whether public or private, competent to determine what electronic signatures are considered reliable, and the appropriate method, which must be compatible with recognized international standards.

It is proposed that, to avoid a duplication of competencies between organs of different States, the Commission should designate an appropriate international organ to fix international standards. It would be understood that this organ would make proposals and recommendations to States so that, through their regular, internal channels, they could establish the necessary conditions for their adoption, always without prejudice to the application of the principle of autonomy that is applicable to all aspects of the draft.

It must be borne in mind that the overriding principle is the right of private persons to establish the technological conditions that will govern their relations; if they do not exercise this right, what applies is international standards previously defined by an international organ and adopted by the State, either through a domestic body or as a result of the development of the practices of electronic commerce.

It would make no sense to restrict the freedom of private persons to agree on a particular technology for an electronic signature that is suitable for the conduct of their relations, still less to exclude its use, by fixing an obligatory standard. International standards will make it possible to guide users of electronic commerce in the appropriate and reliable utilization of information technologies.

The international organ proposed for establishing international standards must bear in mind that the standards must not contradict the principle of technological neutrality.

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[5] These requirements are similar to those set out in article 28 of Law 527 of 1999 concerning the legal attributes of a digital signature, when it is considered equivalent to a handwritten signature.

The question of international standards becomes important when one seeks to promote the harmonization and uniform application of the legal aspects of electronic commerce, since they will permit States, technologically, to achieve minimum levels of protection and consequent security.

The existence of an organ to consider and establish international standards would help to reduce the technological gap between the various countries and allow a homogeneous application of the tools of electronic commerce.

The draft expressly introduces the criterion of technological neutrality in the form of *equal treatment of signature technologies*, by indicating, among other things, that, unless the parties agree otherwise, signature technologies must receive equal treatment and no method of creating an electronic signature that satisfies the requirements in article 6 (1) or meets the requirements of applicable law is to be excluded, restricted or deprived of legal effect. This criterion is met, from our point of view, in the Model Law on Electronic Commerce and in Law 527 of 1999, in the definition of a signature in article 7, which is not so specific but has similar legal consequences.

In regard to this aspect, the draft is inconsistent. Article 3, combined with article 5, gives the parties the possibility to assign legal validity to particular methods of creating electronic signatures. If, however, one reads article 7 carefully, this possibility will be limited, because the compliance of the electronic signature used with article 6 will be determined by the person, organ or authority, whether public or private, specified by the enacting State as competent to determine which electronic signatures satisfy the provisions of article 6—that is to say, comply with a requirement for a signature. The possibility for the parties to make exceptions or agree on something else is thus reduced.

Legal systems based on written law, if they accepted this type of provision, would have to adopt it in an imperative form, because otherwise it would have no concrete effect, apart from the fact that non-compliance would lead to sanctions. For Colombia, this aspect would have no practical function if it is taken into account that party autonomy takes precedence in the whole context of the law. In other words, an agreement between the parties could not change what had been previously established by a competent organ regarding compliance of an electronic signature with article 6.

The proposal would be that international standards should be determined by an international organ designated by the Commission to serve as the point of reference for States, that States should determine the manner of adoption of these proposed standards, and that what appears in square brackets should be deleted: "[*Any person, organ or authority, whether public or private, specified by the enacting State as competent*]".

Otherwise, if the proposal to designate an international organ for fixing standards is not accepted, it would then be important to preserve the principle of autonomy by adding to the proposed article the words "without prejudice to the right of the parties to agree on the use of any method for creating an electronic signature"—so that the article would read as follows: "*Any person, organ or*

*authority, whether public or private, specified by the enacting State as competent may determine which electronic signatures satisfy the provisions of article 6, without prejudice to the possibility for the parties to agree on the use of any method for creating an electronic signature."*

The draft provides that whether any systems, procedures and human resources utilized by a certification service provider are trustworthy (reliable) is to be determined in the light of factors such as: (a) financial and human resources, including existence of assets; (b) quality of hardware and software systems; (c) certification procedures and availability of information; (d) regularity and extent of audit by an independent body; (e) the existence of a declaration by the State, an accreditation body or *the certification service provider* regarding compliance with or existence of these factors.

In this way, the certification service provider is being given discretion to make a declaration regarding compliance with or existence of the factors determining the reliability of the systems, procedures and human resources utilized. It would be more appropriate, as happens in Colombia, for such a declaration to be made by the independent body that carries out the audit, which would be a neutral third party on the same footing as the State of an accreditation body, and not the certification service provider himself, as that would lead to many different interpretations. It is therefore proposed to eliminate this reference.

**Article 10 (f)** would read as follows:

"*(f) The existence of a declaration by the State, an accreditation body or an independent auditing body regarding compliance with or existence of the foregoing*".

The draft again mentions a signature that is "legally effective". It would be important to clarify what type of electronic signature is referred to; this might be the functional equivalent of a handwritten signature, which would be an electronic signature considered reliable. Under this provision, there may exist electronic signatures that are used for other purposes than to produce legal effects, such as those referred to in article 7 of the Model Law on Electronic Commerce. This point may take on more importance if we bear in mind that in other legislations concepts exist such as a reliable electronic signature, an advanced electronic signature, a certified electronic signature or, in the case of Colombia, a digital signature, as functional equivalents of a handwritten signature.

With regard to digital certificates, the draft provides that a certificate issued or electronic signature created or used abroad shall have the same legal effect domestically as certificates issued or electronic signatures created or used in the territory of the receiving State, provided that they offer a *substantially equivalent level of reliability*, this level being established in conformity with recognized international standards and any other relevant factors. This system of cross-border recognition also allows for an agreement between the parties, unless this agreement would not be valid or effective under applicable law.

There is a problem concerning the definition of a *substantially equivalent level of reliability*, a rather ambiguous and broad expression which represents a difficulty

for countries that rely on written laws, because there needs to be certainty about the elements composing this definition so that it can be applied and misinterpretations avoided.

There can be no doubt that, while electronic commerce has demonstrated the advantages that it offers in facilitating transactions, its use generates uncertainty in view of the need to guarantee not only the security of transactions but also confidence in them. For this reason, there is a need for vigilance and, if appropriate, supervision on the part of State organs that will ensure the proper operation of the system and the protection of the rights of users and consumers.

### 3. General outlines for a guide to enactment of the Model Law on Electronic Signatures

The Colombian Government would incline towards having the terms of the guide reflect, in the first place, the basic principles of the Model Law on Electronic Commerce—namely, the international character of the Law, technological neutrality, functional equivalents, autonomy and flexibility, so as to preserve the link with the work done on the Model Law on Electronic Commerce and to contribute to legal harmonization.

The guide must state the specific objective of the Model Law and indicate the importance of States taking into account the work done by the Working Group on Electronic Commerce since 1985, so that they can consider the subject as a whole and so that harmony will be preserved in their incorporation of the provisions in national legislation.

Those States that have not yet defined their internal position with regard to electronic commerce need a general, overall vision of the work of UNCITRAL and must not see the documents as isolated pieces of work.

If the text of the Model Law does not give any details regarding international standards or the organ to determine them, it will be useful for them to be mentioned in the guide so that they can be taken into account by States when they consider the reliability of their systems and the criteria to be taken into account when they accept the use of these technologies.

Similarly, if provisions concerning monitoring and supervision are not included in the Model Law, it will be important to mention the usefulness of these aspects in the digital environment, taking into account not only the application of the principles of electronic commerce but also the good faith of those who engage in electronic transactions and the protection of the rights of consumers.

Through the protection of consumers' rights, States can be helped to adopt effective, acceptable tools that will permit the development of electronic commerce, because the existence of effective supervision does not limit development; on the contrary, it creates certainty for those using electronic means in their commercial relations.

**4. Legal aspects of electronic commerce**

Throughout the discussions that have taken place within UNCITRAL and the Working Group on Electronic Commerce, an attempt has been made to provide legal mechanisms which will eliminate uncertainty in electronic relations and create the necessary validity and legal force to allow these transactions to be relied on.

This quest for legal security has led to the formulation of the Model Law on Electronic Commerce and the Model Law on Electronic Signatures, aimed at harmonizing the application of law in the field of electronic commerce, taking into account technological inequalities in the various States of the world, so that they can adopt general principles permitting legal harmonization.

However, there are still many issues that have not been resolved, and for some States proposals like the model laws are not sufficient. For this reason, discussion has commenced on the possibility of concluding a binding international instrument on electronic commerce, in which the legal conditions to govern commerce using data messages will be established in a uniform manner.

At the present time, there are other legal arguments that might justify the preparation of such an instrument so as to develop the principle of functional equivalents and the definitions of "signature", "writing" and "original" in order to extend their scope of application, so that the different legal systems can be integrated.

For the moment, it will be important for Colombia to hear the views of other delegations in this regard and examine the issues arising.

**5. Possible future work on electronic commerce**

Colombia considers the three topics proposed for the future work of the Working Group to be highly relevant. It also considers that all three subjects are equally important and topical in the developing area of electronic commerce.

In view of the importance of these topics, it is suggested that relevant work should begin in coordination with those working groups and international organizations that are now considering the subjects simultaneously, in order not to lose time and so as to avoid duplication. In this connection, it should be recalled that the Commission has held a debate on the appropriate forum for discussing and studying possible subjects for the Working Group on Electronic Commerce, and the conclusion was reached that the appropriate forum was undoubtedly UNCITRAL.

For Colombia, the proposed topics of electronic contracting and on-line arbitration are of particular importance, without detracting from the importance of the question of dematerialization of documents.

With regard to electronic contracting, this is a subject of considerable uncertainty at the present time, and doubts surround the prospects for its development. Stress has been laid on the relevance of autonomy and good faith of

the parties in electronic contracting, and the links with the UNIDROIT Principles of International Commercial Contracts will have to be strengthened further.

In the case of Colombia, this topic is particularly relevant in the light of efforts being made to ensure that electronic commerce becomes a tool used by Colombian entrepreneurs, within the parameters of flexible and reliable legislation, with electronic contracting taking place constantly.

With regard to the topic of on-line arbitration, its connection with electronic contracting must be taken into account. Traditionally, arbitration has helped to expedite the settlement of conflicts between contracting parties, and has produced solutions to questions of applicable jurisdiction, legislation and domicile.

There can be no doubt that the topic is closely linked to the day-to-day activities of entrepreneurs and to the use of electronic contracting to govern their relations.

However, Colombia considers that it would be relevant to begin a specific study on the importance of the activities of the public administration, in view of the fact that the latter is increasingly becoming a major actor in commerce and that its intervention is vital for the development of commerce.

Despite the various economic theories calling for non-intervention of the State in the economy, it has to be remembered that the State is one of the main promoters of interaction between enterprises, whether as an intermediary in procedures relating to external trade, exchange control, customs, etc., or as a purchaser and contractor of goods and services.

It must also be recognized that great changes are taking place in the manner in which States operate. They require a physical and technological infrastructure and procedures of high quality, and they need to be more productive, competitive and efficient so as to be able to provide a public service under the best possible conditions.

Against this background, the great majority of States have embarked on public policies enabling them to take up the challenges of the new economy and to develop an appropriate physical, technological and human infrastructure to cope with the needs of the new forms of commercial relations.

These policies are aimed not just at allowing the country to keep technologically abreast of other countries, but also at the practical development of procedures that will permit interaction with users in a framework of security and legal certainty.

This makes it important to draw up uniform rules on the utilization of data messages and electronic signatures in activities or contracts associated with the public administration, the notarization function and documents subject to special formal requirements for their validity or confirmation, and develop ways of allowing the procedures concerned to adapt to a digital environment without losing their essential character.

For Colombia, it is clear that the UNCITRAL Working Group on Electronic Commerce, on the basis of the principles set out in the Model Law on Electronic Commerce and in the draft Model Law on Electronic Signatures, can give effective guidance to national legislators in countries with a continental legal tradition, or countries whose legal provisions call for administrative and notarization procedures involving an obligatory signature or authentication by a third party, with additional requirements relating to the identification of the participants and/or the personal appearance of the parties.

Functional equivalents can be developed using security techniques such as digital signatures and digital certificates which will guarantee the security, integrity and confidentiality of the information sent or received by the parties to an act or transaction and a third party confirming the identity of the parties and the content of their declarations.

The formulation of uniform principles of functional equivalence in these areas would help the State to shift more efficiently to electronic information systems, and would establish standards of legal security with regard to information made available by enterprises and citizens to the State or government agencies.

### 6. Conclusions

The Colombian Government, through the inter-agency committee representing various public and private bodies concerned with electronic commerce, is closely following the discussions in the various international forums concerning this subject, and especially the discussions within UNCITRAL, which is considered the appropriate forum for considering matters related to electronic commerce.

In view of the interest in electronic commerce in Colombia, the Government intends to continue working in this field. The present document is therefore a preliminary indication of the position of the Government, and it hopes to develop these points further during the session of the Commission.

## Czech Republic

**[Original: English]**

### General comments

We highly appreciate all activities and work done by the UNCITRAL in the sphere of unification of rules, concerning the electronic commerce. We would like to use this opportunity to inform you, that on October the 1st 2000 the Act N° 227/2000 Coll., on electronic signature, has entered into force in the Czech Republic.

**Specific comments**

**Article 1:** The scope of the Czech act N° 227/2000 Coll. is broader, than the scope of the draft UNCITRAL Model Law, as defined in this Article. It is not limited to commercial activities. Nevertheless, due to the aim of draft Model Law, we find the sphere of application to be sufficient and satisfying.

**Article 7:** We agree with the proposed wording in the square brackets. Under the abovementioned act N° 227/2000 Coll. special authority, Office for Personal Data Protection, is given the power to accredit qualified certification services providers. This accreditation is related to the enhanced electronic signature, which is to be used for specific purposes. We consider this to be a kind of determination anticipated in this provision of the Model Law.

**Conclusion**

We have found the draft of UNCITRAL Model Law to be highly valuable source of legal information during recent (and also future) process of preparation of relevant Czech law. At present stage, a matter of high priority for our country is the harmonization of our law with the law of the European Union.

## France

**[Original: French]**

In general, France would not like to see the text, which is the result of several years of negotiation, reopened for discussion at the next session of the United Nations Commission on International Trade Law.

It wishes to make the following brief suggestions, which should not affect the balance of the text.

**Article 9 (1) (d) (iv)**: The end of the sentence refers to liability stipulated by the certification service provider, which is already the subject of the main sentence; subparagraph (d) (iv) should therefore read:

"any limitation on the scope or extent of *its* liability stipulated by *it*"

It should nevertheless be borne in mind that liability is, moreover, stipulated by each of the parties (certification service provider and signatory) and not only by the provider. Consequently, the following sentence could be added to the end of article 8, which deals with the conduct of the signatory:

"*It shall provide to the certification service provider for any party relying on the certificate reasonably accessible means to ascertain, where relevant, from the certificate referred to in article 9 or otherwise, any limitation on its responsibility.*"

**Article 11 (b)**: The words "where an electronic signature is supported by" should be replaced by "where a signature is based on".

## B. Non-governmental organizations

### Cairo Regional Centre for International Commercial Arbitration

**[Original: English]**

It looks that the draft will need more time to be studies carefully.

The accurate determination of the legal responsibility in some cases of violation is still missing in the draft.

However, it appears that reference to the general rules of responsibility would still be necessary in cases where it would not be required to have special treatment.

Also, the limits of responsibility of parties in several articles would give space to some problems and difficulties, as it appears that up till now the technicalities of guaranteeing the signatures are not yet complete, and until such development is reached the application of these provisions would be highly risky.

This defect is reflected in the drafting of the project in many instances. Moreover, reference is made to standards and factors which are not determined accurately in considering a certificate or e-signature having a substantially level of reliability.

It is very important also to note that due to the fact many Arab states are now drafting laws of e-commerce and e-signature, accurate translation of documents and provisions would be greatly helpful. In comparing the Arabic and English versions it appears that the Arabic version is far from being satisfactory.

A detailed memo is being prepared to be sent to the UNCITRAL Headquarters shortly.

[1] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), paras. 249-251.

[2] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), paras. 207-211.

[3] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 308-314.

[4] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 380-383.

[5] A/CN.9/483, paras. 21-23.

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# Draft Model Law on Electronic Signatures

## Compilation of Comments by Governments and International Organizations

### Addendum

## Introduction

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Electronic Commerce at its 35th session was circulated to all governments and to interested international organizations for comment. On 15 June 2001 the Secretariat received a note by the United Kingdom of Great Britain and Northern Ireland. That note is reproduced below in the form in which it was communicated to the Secretariat.

V.01-84912

The United Kingdom does not wish to see the text of the Articles reopened for widespread discussion at the forthcoming plenary session of UNCITRAL. However, a suggestion is made for a slight amendment to the text which, it is hoped, will clarify a matter related to one of the purposes of a Certificate.

At the last meeting of the Working Group on Electronic Signatures it was agreed to improve the text of the Guide to Enactment so as to clarify that, when there is a dual-key "Digital Signature" and a related Certificate, an important purpose of a Certificate is to certify that it is the "public key" which belongs to the signatory. This is now reflected in the draft Guide at paragraph 97 (Annex to A/CN.9/493).

In order to ensure that the Model Law also clearly shows this, and that it and the Guide are in alignment, two minor drafting changes to Articles 2 and 9 are suggested.

a) In the Definitions Article 2(b) should now read:

**Article 2(b)**

**"Certificate" means a data message or other record confirming:**

**(i) in a case where a private and a public cryptographic key are used respectively to create and verify an electronic signature, the link between the signatory and the public cryptographic key; and**

**(ii) in any case, the link between the signatory and the signature creation data.**

b) In Article 9(1)(c) a new sub-paragraph (iv) be inserted after (iii) to read:

**Article 9(1)(c)**

**(iii) .....; and**

**(iv) in any case falling within Article 2(b)(i), that the public cryptographic key is that of the signatory identified in the certificate;.**

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# Draft Model Law on Electronic Signatures

## Compilation of Comments by Governments and International Organizations

### Addendum

## Introduction

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Electronic Commerce at its 35th session was circulated to all governments and to interested international organizations for comment. On 29 June 2001 the Secretariat received a note by the United States of America and a note by the International Chamber of Commerce. The texts of those notes, both of which contain comments and proposals with respect to the draft Model Law on Electronic Signatures, are reproduced below in the form in which they were communicated to the Secretariat.

V.01-85326

# Compilation of comments

## A. States

### Unites States of America

We believe, as stated at the 38th session of the Working Group, taking into account considerable representation from industry and e-commerce law groups, that certain changes, at a minimum, should be made if the draft Model Law is to promote trade and avoid having a negative effect on e-commerce.

Other changes and technical corrections will be raised as appropriate. The most important changes we believe necessary are within articles 8 to 11:

(1) Articles 8 to 11 should be subject to a general limitation that the criteria and rules therein be applied as is reasonable under the circumstances of the type of transaction and the nature of the parties. The imposition of strict obligations is inappropriate if applied to a wide variety of transactions that have developed in e-commerce.

(2) Article 8 (1)(a): The terms "in accordance with accepted commercial practices" should be inserted before "reasonable care".

(3) Article 8 (1)(b) should be restated to remove an overly broad standard, rejected by commentators as infeasible, as follows:

> "(b) without undue delay, use reasonable efforts to initiate any procedures made available to the signatory to notify relying parties if: "

(4) Article 8 (2): Determining liability rules for one party is an exceptional position to take within the commercial law, which fails to balance the actions of other parties and will unduly burden the use of e-commmerce signatures. Article 8 (2) should thus be revised to reflect the standard used in article 11: "A signatory shall bear the legal consequenses of its failure to ...".

(5) Articles 9 and 10: These articles focus on a technology application that in commerce is used for certain purposes but may be inappropriate if applied to a wider range of e-commerce functions. Moreover, the standards set out cannot be met for most e-signatures and few services could comply. Both articles insufficiently protect the ability of service providers to limit the scope of what they offer and the extent to which they can avoid unreasonable exposure to liabilities.

(6) Article 9 (1)(f): In addition to language that should be added to assure service providers the ability to control the extent to which their services can be relied on and the limits of the services offered, article 9 (1)(f) should not be connected to article 10, since article 10 sets out standards well exceeding the resources and services offered generally by participants in this field.

(7) Article 9 (2): As with article 8, this article purports to assign liability without reference to the role of other parties, an inappropriate result for the commercial law.

Article 9 (2) should be amended as follows:

> "Subject to any reasonably accessible limitations on the scope or extent of services to be provided, as well as liability limits stipulated by the certification service provider, such a provider shall bear the legal consequences of its failure to comply with paragraph (1)."

(8) Article 10: As noted, the standards set out considerably exceed actual practices for services generally provided today. The leading sentence should thus be modified by adding "... factors, if and to the extent generally applied in commercial practice for the level of service provided, and if relied on by a relying party: "

(9) Article 11: Article 11 should be amended to provide, in accordance with commercial and transactional practices where applicable, that relying parties assume a greater responsibility for ascertaining the reliability of a signature than is now provided by this article.

## B. Non-governmental organizations

### International Chamber of Commerce (ICC)

The International Chamber of Commerce's delegation (ICC) to UNCITRAL has contributed its knowledge of business realities and technology expertise throughout the development of the UNCITRAL Working Group on Electronic Commerce's Draft Uniform Rules on Electronic Signatures and complementary Guide to Enactment.

ICC acknowledges its full support of the UNCITRAL process and believes that – as the World Business Organization – it can benefit the process through its unique private sector perspective. To this end, ICC wishes to address three issues regarding the current versions of the Model law and the Guide to Enactment which will be discussed during the current round of discussions by UNCITRAL.

ICC's concerns are presented forthwith in order of importance.

### I. Guide to Enactment paragraphs 69, 135 and 159

ICC is primarily concerned that paragraphs 135 and 159 of the current version of the Guide to Enactment be amended to reflect changes made to paragraph 69 of the same version during the 13 March 2001 session in New York. At that session, both ICC and the Spanish delegation requested these paragraphs be amended to limit the risk of industry-led voluntary standards processes being given anything less than due regard. ICC suggests that this concept be incorporated into paragraphs 135 and 159 either directly or by reference to paragraph 69.

## II. Model Law Article 5

ICC member companies from around the world have indicated substantial concern that Model Law Article 5 could, if unchanged, have a substantial negative effect on the use of electronic signatures and electronic commerce. Thus, ICC urges that Model Law Article 5 be changed by way of one of the following options (listed in order of preference):

- ***Option 1***
  Delete the final clause of Article 5 ("unless that agreement would not be valid or effective under applicable law");

- ***Option 2***
  Replace the words "applicable law" with "mandatory principles of public policy."

ICC offers the following justification for either of the above proposed changes:

- **Danger of confusion.** Many national judges may not have access to the Guide to Enactment when applying the Model Law as implemented in national law, and could construe the reference to "applicable law" to mean that any sort of statute, case law, or other legal provision, even if it is not very weighty, should override party autonomy (see below). "Applicable law" is thus in this sense potentially over-broad.

- **Clarification.** The Guide to Enactment (see para. 110) makes it clear that any limitation on party autonomy is intended to apply only to "mandatory rules, e.g., rules adopted for reasons of public policy," which term would be construed quite narrowly in most legal systems to refer to principles in which there was an overwhelming public or governmental interest. However, the text of Article 5 allows party autonomy to be overridden by "applicable law," which could refer to almost any sort of legal provision. Removing the reference to "applicable law" is thus not a change in substance, but will only realize the intent of the Working Group.

- **Elimination of superfluous language.** The limitation on party autonomy is unnecessary, since in most legal systems, mandatory rules of public policy or *ordre public* would override party autonomy in all cases (i.e., whether or not they are mentioned in the text).

- **Danger of harmful business effects.** Many uses of electronic signatures are presently dependent on full effect being given to the contractual relations between the parties. Electronic commerce could be significantly harmed if national legislators and courts were given the mistaken impression that UNCITRAL intended to limit party autonomy more than is absolutely necessary.

## III. Model Law Articles 8-11

ICC is concerned that Model Law Articles 8-11 are over-broad, difficult to apply and unreflective of business reality. ICC welcomes an opportunity to further discuss the impact of these provisions in light of business realities.

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# Draft Model Law on Electronic Signatures

## Compilation of Comments by Governments and International Organizations

### Addendum

## Introduction

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Electronic Commerce at its 35th session was circulated to all governments and to interested international organizations for comment. On 3 July 2001 the Secretariat received a note by the delegation of Greece. The text of this note, which contains comments and proposals with respect to the draft Model Law on Electronic Signatures, is reproduced below in the form in which it was communicated to the Secretariat.

V.01-85554

# Compilation of comments

## A. States

### Greece

**1.- Article 2(d)**

The "signatory" is a person that acts either on its own behalf or on behalf **"of a person it represents"**. Apparently, the signatory is a physical person, while the person it may represent may be either a physical or a legal person. The question is whether it would be good to add, after the word "person" (second line) the words: **"physical or legal"**.

**2.- Article 2(e)**

One may wonder, which "other services related to electronic signature: the "Certification service provider" may, in practice, provide, except to issue certificates.

**3.- Article 3**

The "applicable law" (last two words in the Article) is the law to be found by the application of the proper rule of private international law of the "given forum". The question is whether, after the words "applicable law", it should be added: **"in accordance with the appropriate rule of private international law"**.

**4.- Article 4(1)**

**(a)** Perhaps, which mostly matters "in the interpretation of this Law" is the international **character** (or, nature) of it, as well as its **purpose**. If that is correct, it should, after the word "origin" (first line), add the words: **", character, and purpose"**.

**(b)** "Questions concerning matters governed by this Law, which are not expressly settled in it" can be settled, not only "in conformity of the general principles on which this Law is based", but **"by application of rules of an analogy"**, as well. The question is if is advisable to add these (six) words.

**5.- Article 5**

"Applicable law" (last two words): the comment of Article 3 (above, No 3) applies here, too.

**6.- Article 6(3)(a)**

It is suggestable to add the word **"only"**, after the word "linked" (second line), for emphasis.

7.- **Article 6(3)(b)**

For the same reason, before the word "control" (first line), the word **"exclusive"** may be added.

8.- **Article 7(2)**

This paragraph seems to state the obvious. It is retainable, or would be better to **delete it**?

9.- **Article 8(2)**

Certainly, liability is the result of "failure to satisfy the requirements..." but such a failure must be a "product" **of not giving reasonable care** to satisfy the requirements... Perhaps, some **qualification of the "failure"** is necessary to be inserted in the text.

10.- **Article 9(1)(f)**

To "(trustworthy) systems, procedures and human resources", perhaps, **"means"** may be added, preferably between the words: "systems" and "procedures".

11.- **Article 9(2)**

On the word "failure", the comment on Article 8(2) (above, No. 10) applies here, too.

12.- **Article 10**

(a) The comment on Article 9(1)(f) (above, No. 8), **to qualify the word "failure"**, applies also here (in the second line).

(b) If the **"factors"** enumerated in this Article are not exhaustive, but indicative, the word **"indicative"** might be inserted between the words "following" and "factors" (in the third line). In such a case, **Article 10(g)** should be **deleted**, as superfluous.

13.- **Article 10(e)**

Only "body" (i.e. legal person)? What about **"(an independent) physical person"**? Permitted, or prohibited?

14.- **Article 11(b)**

Is the idea of this provision to establish a (legal) **presumption** of failure etc? Perhaps, some clarification, even of a drafting character, is necessary, or useful.